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# THE JOURNAL OF COLLEGE AND UNIVERSITY LAW

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## ARTICLES

### **Studying is Dangerous? Possible Federal Remedies for Study Abroad Liability**

Robert J. Aalberts, Chad Marzen & Darren Prum 189

Despite the many benefits of study abroad programs, risks are incurred overseas. In the past several years, a number of incidents have resulted in which students studying abroad have not only incurred physical harm, but in some instances have died while enrolled in a study abroad program. The current liability standards governing study abroad programs are murky. This article not only discusses the various types of study abroad programs, but state and federal legislation in this area and current court cases which have addressed study abroad liability. This article proposes several possible remedies at the federal level which can be implemented with the intention of reducing risk in study abroad programs.

### **Searching for Race-Neutral Alternatives: The College and University Amicus Briefs in *Fisher v. University of Texas***

Benjamin S. Baum 237

This article examines the Supreme Court's decision in *Fisher v. University of Texas* on the use of affirmative action in college and university admissions. First, the author argues that *Fisher* changes the debate on the constitutionality of affirmative action by forcing colleges and universities to use race neutral alternatives to affirmative action, but also by allowing facially race neutral proxies with the explicit intention of increasing racial diversity. Then, in light of how the court changed the means by which colleges and universities can meet the standard, the author reviews amicus briefs filed by colleges and universities in *Fisher* to show that these institutions failed to articulate how their policies may or may not qualify as race neutral. The amicus briefs reveal that the availability of race neutral alternatives already being employed by colleges and universities are broad and deep.

***Oliver with a Twist: The NCAA's No-Agent Rules Applied to Non-Lawyer Representatives of Baseball Student-Athletes***

Jerry R. Parkinson

257

Student-athletes who retain an agent to represent them in negotiations for professional contracts lose their eligibility to compete at an institution that is a member of the National Collegiate Athletic Association (NCAA). Commentators have criticized the NCAA's "no-agent" rules for years, contending that they put at a disadvantage those student-athletes who wish to test the professional waters, but retain the option of competing in college should they choose not to turn pro. No-agent issues are particularly acute in the sport of baseball, in which student-athletes do not "declare" for the draft; they are simply drafted by professional teams. The NCAA has complicated the matter by permitting student-athletes to retain "advisors," but the line between advisors and agents is not easily drawn. This article examines the application of the NCAA no-agent rules to non-lawyer representatives of baseball student-athletes, using a recent case as an example. The article addresses concerns that arise in this context and offers suggestions for the NCAA and member institutions to consider in applying the no-agent rules in the future.

***Athletic Compensation for Women Too? Title IX Implications of Northwestern and O'Bannon***

Erin E. Buzuvis

297

This Article examines that role that Title IX has played in the debate over college athlete compensation, including the Title IX implications of litigation that seeks to use labor and antitrust law to challenge the National Collegiate Athletic Association's longstanding amateurism policies. The Article acknowledges that because the justification for extending labor and antitrust law to college athletics stems from the commercial nature of the enterprise, there is an understandable tension with Title IX, which operates to constrain market choices by requiring institutions to support women's programs with less potential for revenue. Nevertheless, it takes the position that Title IX applies to athlete compensation. Despite its commercialism, college athletics benefits in numerous ways from its affiliation with higher education, and is therefore appropriately bound by Title IX obligations that apply in that context. This conclusion is important because of the leverage it provides to a broader project of college athletics reform. If, as the NCAA has suggested, Title IX implications render the application of labor and antitrust law to college athletics prohibitively expensive, the NCAA's only choice



will be to reform college athletics to restore the primacy of educational over commercial values, or alternatively, to separate the commercial interests from higher education entirely. Either approach would simultaneously address concerns about the exploitation of uncompensated labor, gender equity, educational compatibility, and cost containment. For this reason, it is important that college athletics confront the Title IX implications of decisions that result in athlete compensation.

#### NOTE

##### **Resolution Mechanisms to Combat Financial Pressures within Colleges and Universities**

Cara Swindlehurst 343

This Note explores how colleges and universities resolve issues that come about due to financial pressures. Such pressures can be dealt with in a multitude of ways, including contract drafting, raising tuition, replacing tenured faculty with new hires, and downsizing or eliminating programs and departments. This Note examines the types of lawsuits that these mechanisms may result in, as well as current case studies in which institutions have implemented one or more of the mechanisms. In conclusion, this Note discusses the most efficient means of responding to financial pressures within a legal framework.

#### BOOK REVIEWS

##### **The Coal Miner's Daughter Preference: A Review of Cashin's *Place, Not Race: A New Vision of Opportunity in America***

William E. Thro 375

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# STUDYING IS DANGEROUS? POSSIBLE FEDERAL REMEDIES FOR STUDY ABROAD LIABILITY

ROBERT J. AALBERTS\*, CHAD MARZEN\*\* & DARREN PRUM\*\*\*

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## INTRODUCCION

On the evening of March 27, 1996, four American college and university students, along with three other individuals, lost their lives in a bus accident on a road between New Delhi and Agra, India.<sup>1</sup> The students were taking part in a study abroad program called the Semester at Sea sponsored by the University of Pittsburgh, where participants sail on a cruise ship throughout the world and visit various countries.<sup>2</sup> While on the ship, and during visitations of the countries, the Semester at Sea program participants take regular college and university courses.<sup>3</sup> Participants in Semester at Sea also take part in “field programs,” which consist largely of guided tours and visits to historical and cultural landmarks within various countries.<sup>4</sup> On March 27, 1996, the four students who lost their lives were on such a field program in India.<sup>5</sup> The driver of their bus was allegedly in an intoxicated condition and had worked for more than 24 consecutive hours.<sup>6</sup>

In 2005, the University of Pittsburgh ceased its relationship with the Institute for Shipboard Education, the nonprofit entity that operates the Semester at Sea program, citing safety concerns.<sup>7</sup> The University of Virginia has sponsored the program since 2006 and since that time at least three college and university students have died while studying abroad,

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1. *See Safety in Study Abroad Programs: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Education and the Workplace*, 106th Cong. (2000) (statement of John G. Amato) [hereinafter Amato].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *See* Ron French, *As college programs grow, so do the risks*, DETROIT NEWS (Aug. 27, 2000), <http://www.detnews.com/specialreports/2000/costarica/sunofflead/sunofflead.htm> [hereinafter French].

7. *See* Associated Press, *After rough trip, school cuts ties with Semester at Sea*, USA TODAY (June 7, 2005), [http://usatoday30.usatoday.com/news/education/2005-06-07-semester-sea\\_x.htm](http://usatoday30.usatoday.com/news/education/2005-06-07-semester-sea_x.htm).

including an incident in December 2012 in Dominica in which a student in the program died following a boating accident.<sup>8</sup>

And tragic incidents such as those described above are not limited to the Semester at Sea program – physical injuries and even deaths of students have occurred in other programs sponsored by nonprofit programs at colleges and universities.<sup>9</sup> In February 2014, a college student and student-athlete who attended Bates College died in mysterious circumstances in Rome, Italy while enrolled in a study abroad program.<sup>10</sup> While not an injury incurred by a college or university student, a student (who was a minor at the time of the incident) at the Hotchkiss boarding school in Connecticut contracted encephalitis from a tick while on a school-sponsored overseas trip to China during the summer of 2007, which caused severe brain damage.<sup>11</sup> The student and her family sued the Hotchkiss School, alleging the school failed to take adequate safety precautions to protect the students from the risk of encephalitis, and a jury awarded them \$41.7 million in March 2013.<sup>12</sup> The verdict is currently on appeal.<sup>13</sup> All of these incidents have brought renewed attention to the possible risks of studying abroad.

Every year, thousands of college and university students seek to study abroad to not only gain the cultural experience of “seeing the world,” but also to enrich their academic studies. According to NAFSA: Association of International Educators, during the 2011–2012 academic year, approximately 283,332 students sought academic credit while studying abroad.<sup>14</sup> The majority of students who studied abroad during the 2011–2012 year enrolled in short term summer programs, or programs that last eight weeks or less.<sup>15</sup> During that same time frame, approximately twenty–

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8. See Catherine Valentine, *Legal proceedings begin over Casey Schulman's death*, CAVALIER DAILY (Oct. 30, 2013), <http://www.cavalierdaily.com/article/2013/10/lawsuit-filed-in-casey-schulman-death> [hereinafter Valentine].

9. See French, *supra* note 6.

10. See Laura Petrecca, *Missing U.S. student in Italy found dead*, USA TODAY (Feb. 22, 2014), <http://www.usatoday.com/story/news/2014/02/22/missing-student-italy/5726619/>.

11. See Ben Waldron, *Woman Who Contracted Encephalitis on School Trip Awarded \$41.7 Million*, ABC NEWS (Mar. 29, 2013), <http://abcnews.go.com/US/woman-contracted-encephalitis-school-trip-awarded-417m/story?id=18840034>.

12. *Id.*

13. See Kaitlin Mulhere, *Higher ed groups caution court decision could discourage study abroad*, INSIDE HIGHER ED (Oct. 24, 2014), <https://www.insidehighered.com/news/2014/10/24/higher-ed-groups-caution-court-decision-could-discourage-study-abroad>.

14. See *Trends in U.S. Study Abroad*, NAFSA, [http://www.nafsa.org/Explore\\_International\\_Education/Advocacy\\_And\\_Public\\_Policy/Study\\_Abroad/Trends\\_in\\_U\\_S\\_Study\\_Abroad/](http://www.nafsa.org/Explore_International_Education/Advocacy_And_Public_Policy/Study_Abroad/Trends_in_U_S_Study_Abroad/) (last visited Mar. 3 2015).

15. See “Fast Facts”: *International Students in the U.S.*, INST. OF INT’L. EDUC.

one million college and university students were enrolled in degree-granting institutions in the United States.<sup>16</sup> In total, the study abroad industry is approximately a \$20 billion dollar per year industry today.<sup>17</sup>

Study abroad programs are heralded not only for allowing college and university students to obtain a new cultural and academic experience, but also advocates of the programs emphasize the diplomatic and economic benefits received by all participants involved. With these positive benefits in mind, the United States Congress, as well as state legislatures throughout the country, have generally supported the overall aims, goals, and missions of study abroad programs.

Despite the positive benefits of study abroad programs, the programs are not without the potential for risk. Overall, the number of reported cases involving study abroad liability issues is very small compared to the number of students who have studied abroad in the past two decades. However, as discussed earlier, in one incident four students were killed in a bus accident in India. In another, two female students were abducted and killed in Costa Rica.<sup>18</sup> In yet another, five female students were raped by a group of bandits while studying abroad in Guatemala.<sup>19</sup> Despite the presence of these risks, very few cases have made it to the appellate stage of review, and the standards of liability concerning study abroad liability nationwide remain quite murky.

The nature of the risks involved with study abroad programs has spurred a literature discussing such issues not only in law review articles,<sup>20</sup> but

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(2013), available at <http://www.iie.org/Research-and-Publications/Open-Doors/Data/Fast-Facts>.

16. See Chapter 3: *Postsecondary Statistics*, NAT'L. CTR. FOR EDUC. STATISTICS (2014), available at [http://nces.ed.gov/programs/digest/d12/ch\\_3.asp](http://nces.ed.gov/programs/digest/d12/ch_3.asp).

The figure of approximately 283,332 students studying abroad in 2011–2012 can be compared with the number of international students who seek a degree in the United States annually. In 2012–2013, according to the Institute of International Education approximately 250,920 international students were enrolled in United States higher education institutions. See “Fast Facts”, *supra* note 15, at tbl. A.

17. See Maury Glover, *Mother whose son died abroad wants other parents to prepare*, KMSP-TV (Nov. 19, 2012), <http://www.myfoxtwincities.com/story/19610080/mother-whos-son-died-abroad-warms-of>.

18. See French, *supra* note 6.

19. *Id.*

20. See, e.g., Robert J. Aalberts, Kenneth D. Ostrand, & Kenneth G. Fonte, *The University, the Law, and International Study Programs*, 50 CONTINUUM 153 (1986) (discussing possible theories of liability against universities that sponsor overseas study abroad programs); Robert J. Aalberts & Kenneth D. Ostrand, *Negligence, Liability and the International Education Administrator*, 7 J. ASS'N INT'L EDUC. ADMIN. 59 (1987) (analyzing potential situations in which an international education administrator may incur liability in cases where it directs a study abroad program); Robert J. Aalberts & Richard B. Evans, *The International Education Experience: Managing The Legal*

among other academic sources as well.<sup>21</sup> While much of this literature has discussed issues concerning the types of risks present in programs, as well as methods and ways to mitigate risks, largely absent is any discussion of potential remedies at the federal level which can be implemented in order to promote safety and compensate those who are injured, or even killed, due to the negligent acts or omissions of an educational institution or nongovernmental institution that sponsors or assists in sponsoring a study abroad program. This Article contributes to the scholarly literature concerning study abroad liability in proposing several remedies that may be implemented at a federal level in order to promote safety and protect all participants of collegiate study abroad programs.

Part I of this Article generally provides a brief overview of the different types of study abroad programs sponsored by educational and

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*Risks*, 13 J. LEGAL STUD. EDUC. 29 (1995) (noting there are three ways in which a university may limit liability for risks incurred in overseas study abroad programs but yet also protect the principle of fairness for students – first, choice of forum clauses; second, through a choice of law clause; and third, through an arbitration clause); William P. Hoye, Comment, *The Legal Liability Risks Associated with International Study Abroad Programs*, 131 EDUC. L. R. 7 (1999) (highlighting the risks of sexual harassment, transportation issues, and terrorism associated with study abroad programs and highlighting a “Risk Assessment Audit” for universities to minimize risk) [hereinafter Hoye I]; William P. Hoye & Gary M. Rhodes, *An Ounce of Prevention is Worth . . . The Life of a Student: Reducing Risk in International Programs*, 27 J.C. & U.L. 151 (2000) (mentioning ways in which colleges and universities and organizations sponsoring study abroad programs can minimize risks) [hereinafter Hoye & Rhodes I]; Jane A. Dall, Note, *Determining Duty in Collegiate Tort Litigation: Shifting Paradigms of the College-Student Relationship*, 29 J.C. & U.L. 485, 518–519 (2003) (proposing an “educational mission” paradigm to apply in cases of tort liability of colleges and universities to students and noting under this paradigm “a college owes a duty when it has clear responsibilities stemming from its educational mission”); J. Wes Kiplinger, Comment, *Defining Off-Campus Misconduct that “Impacts the Mission”: A New Approach*, 4 U. ST. THOMAS L.J. 87 (2006) (proposing a multi-factor analysis to determine whether the off-campus conduct of a student impacts the educational mission of a college or university); Vincent R. Johnson, *Americans Abroad: International Education Programs and Tort Liability*, 32 J.C. & U.L. 309, 359 (2006) (contending that the standard study abroad programs must meet with regard to liability is “reasonably prudent conduct”); Kathleen M. Burch, *Going Global: Managing Liability in International Externship Programs – A Case Study*, 36 J.C. & U.L. 455 (2010) (analyzing the potential liability risks faced by international externship programs).

21. See, e.g., ROBERT D. BICKEL & PETER F. LAKE, *THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE?* (1999) (discussing trends in the law regarding college and university liability from the era of *In Loco Parentis* to the current era); Gregory F. Malveaux, *Risks and Liabilities Associated with Study Abroad Programs in Education: A Case Study of Maryland* (Dec. 2008) (unpublished Ph.D. dissertation, Morgan State University) (on file with author) (analyzing components of waivers utilized by colleges and universities in the State of Maryland by a content analysis); EUGENE L. ZDZIARSKI II, ET AL., *CAMPUS CRISIS MANAGEMENT: A COMPREHENSIVE GUIDE TO PLANNING, PREVENTION, RESPONSE, AND RECOVERY* (2007) (discussing the issues colleges and universities face concerning emergency preparedness plans as well as contemporary issues in crisis management).

nongovernmental institutions, as well as the purported benefits of such programs. In Part II, the Article summarizes the involvement of the federal and state governments in study abroad programs. Through the Commission on the Abraham Lincoln Study Abroad Fellowship Program, the Senator Paul Simon Study Abroad Foundation Act, State Department initiatives, and legislation at the state level, both the federal and state governments have generally followed a policy of promoting the benefits of studying abroad.

Part III comprehensively addresses the various liability risks involved with study abroad programs, as well as responses of the study abroad industry to these risks. In addition, Part III of the Article discusses the governmental and nongovernmental responses to these risks, as well as reported cases to date which have addressed liability issues of study abroad programs.

Given the contemporary risks faced by participants in study abroad programs throughout the world, the Article proposes three possible remedies at the federal level in Part IV. One such remedy would be the implementation of a national standard of liability for cases involving study abroad programs, similar to the Federal Employers' Liability Act ("FELA").<sup>22</sup> The Article also analyzes a possible remedy of a federal cause of action for wrongful death, similar to the Death on the High Seas Act ("DOHSA"),<sup>23</sup> which would apply in cases resulting in the wrongful death

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22. Employers' Liability Act, 45 U.S.C. § 51 (2014) [hereinafter Federal Employers Liability Act], states the following:

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

In essence, "FELA . . . allows railroad employees to sue their employer for any injury 'resulting in whole or in part from the negligence' of the railroad." Kyle W. Ubl, Note, *The (Un)foreseen Effects of Abrogating Proximate Causation in CSX Transportation, Inc. v. McBride: The New Role of Foreseeability Under FELA and the Jones Act*, 87 NOTRE DAME L. REV. 2261, 2263-64 (2012).

23. Death on the High Seas Act, 46 U.S.C. § 30302 (2014), states the following:

When the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles from the shore of the

of a participant enrolled in a study abroad program. Finally, the Article analyzes the possibility of creating a federal entity charged with oversight of study abroad programs. With these possible remedies at the federal level, policymakers can examine these solutions to better protect all participants in study abroad programs and provide federal remedies in cases where those who participate in a study abroad program are harmed.

### I. STUDY ABROAD PROGRAMS IN THE TWENTY-FIRST CENTURY

As the world and the global economy have become more interconnected, studying abroad has become more appealing to college and university students. And the number of students studying abroad has increased dramatically in the past twenty-five years. From 1991–1992 to 2003–2004,<sup>24</sup> the number of college and university students who studied abroad nearly tripled.<sup>25</sup> In addition, from the 2003–2004 academic year to the 2011–2012 academic year, the number of students studying abroad rose over 65 percent.<sup>26</sup>

With the growth in the number of students studying abroad, different types of study abroad programs have developed, and advocates of studying abroad have articulated educational, economic, cultural, foreign policy and national security arguments to support the industry.

#### A. Types of Study Abroad Programs

There are several different types of study abroad programs which universities and colleges sponsor. In one type of program, a student participates in a program sponsored by a U.S. educational institution.<sup>27</sup> Some programs are led by a faculty member or member(s) from that student's own educational institution.<sup>28</sup> Other programs may be directly

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United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible. The action shall be for the exclusive benefit of the decedent's spouse, parent, child, or dependent relative.

24. Approximately 191,321 students in 2003-2004 studied abroad. Burton Bollag, *Panel Supports Grants for Study Abroad*, CHRON. HIGHER EDUC. (Nov. 25, 2005), <http://chronicle.com/article/Panel-Supports-Grants-for/30966> [hereinafter Bollag].

25. *See id.*

26. *See Trends in U.S. Study Abroad*, *supra* note 14.

27. *See* Nicholas Trott Long, *Managing Safety and Liability in Study Abroad Programs*, for 21ST ANNUAL LEGAL ISSUES IN HIGHER EDUCATION CONFERENCE (2011), [http://learn.uvm.edu/wordpress\\_3\\_4b/wp-content/uploads/2011-09-15-Managing-Safety-and-Liability-in-Study-Abroad-Programs.pdf](http://learn.uvm.edu/wordpress_3_4b/wp-content/uploads/2011-09-15-Managing-Safety-and-Liability-in-Study-Abroad-Programs.pdf) (discussing the operation of branch campuses abroad by American educational institutions); *see also* David Keitges, *The Portfolio Model of Institutional Study Abroad Programming*, NAFSA (2000), available at [http://www.nafsa.org/uploadedFiles/the\\_portfolio\\_model\\_of.pdf?n=7334](http://www.nafsa.org/uploadedFiles/the_portfolio_model_of.pdf?n=7334).

28. *See* Keitges, *supra* note 27.



sponsored by another American institution.<sup>29</sup>

Faculty-led programs may incur a higher risk than other programs sponsored by educational and private institutions.<sup>30</sup> As several experts note, faculty-led programs on occasion may lack local institutional affiliations for access to resources and offer less supervision to participants.<sup>31</sup> Thus, the lack of institutional resources and circumstances of the program may leave a faculty sponsor or sponsors less equipped and prepared to handle the emergencies and risks that may arise on the trip.<sup>32</sup>

In some situations, colleges and universities may directly exchange students in their programs with students from a foreign institution. These programs are often referred to as “exchange programs.”<sup>33</sup> In other programs, a student may leave a U.S. institution and enroll in a foreign institution directly. These “direct programs” typically involve a student making tuition and housing arrangements directly with the foreign institution.<sup>34</sup>

Finally, there are a number of private entities that offer study abroad programs. Some are not-for-profits and others are for-profits.<sup>35</sup> These private entities, often referred to as “third-party providers,”<sup>36</sup> typically will administer many of the logistical aspects of studying abroad.<sup>37</sup> Sometimes these programs will offer courses directly, and in other cases the programs essentially work as an intermediary for a foreign institution.<sup>38</sup>

## B. Arguments for Study Abroad

A number of arguments in support of studying abroad have been articulated by organizations supporting the study abroad industry. NAFSA

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29. *Id.*

30. See Julie Friend, Barbara Lindeman, & Patricia Martin, *Best Practices for Addressing Legal and Risk Management Issues in Education Abroad*, NAFSA, slide 5 (May 31, 2011) (PowerPoint Presentation), [http://studyabroad.isp.msu.edu/research/documents/Friend\\_Legal\\_Risk\\_Intro\\_NAFSA\\_BC\\_2011.pdf](http://studyabroad.isp.msu.edu/research/documents/Friend_Legal_Risk_Intro_NAFSA_BC_2011.pdf)

31. *Id.*

32. *Id.*

33. See Long, *supra* note 27; see also *Program Types*, UNIV. OF TENN. AT KNOXVILLE (2014), available at [https://studyabroad.utk.edu/index.cfm?FuseAction=Abroad.ViewLink&Parent\\_ID=E2EC1174-19B9-C0B3-C751A77AFAE78FE1&Link\\_ID=46EC6EE6-19B9-C0B3-C790B5633E3F5421](https://studyabroad.utk.edu/index.cfm?FuseAction=Abroad.ViewLink&Parent_ID=E2EC1174-19B9-C0B3-C751A77AFAE78FE1&Link_ID=46EC6EE6-19B9-C0B3-C790B5633E3F5421).

34. See UNIV. OF TENN., *supra* note 33.

35. See Long, *supra* note 27; see also *Review Third Party Program Providers*, KAN. STATE UNIV., [http://www.k-state.edu/studyabroad/faculty-advisors/fac\\_led/providers.html](http://www.k-state.edu/studyabroad/faculty-advisors/fac_led/providers.html) (last visited Mar. 14, 2015).

36. See KAN. STATE UNIV., *supra* note 35.

37. See Elizabeth Redden, *The Middlemen of Study Abroad*, INSIDE HIGHER ED (Aug. 20, 2007), <http://www.insidehighered.com/news/2007/08/20/abroad#sthash.ruOgC9Yb.dpbs>.

38. *Id.*

is the most prominent nonprofit organization involved in public policy efforts in support of the industry. Several benefits to students have been cited by NAFSA, including that studying abroad helps in developing leadership skills, assists students in creating career options, aids in personal growth and maturity, and improves both academic learning and global awareness.<sup>39</sup>

Outside of benefits to participants in the programs, advocates of study abroad programs also cite the foreign policy, national security, and economic advantages gained by increasing the number of students abroad. NAFSA has emphasized that studying abroad promotes United States foreign policy and diplomacy by promoting greater international understanding, and that it also advances the image of the United States abroad.<sup>40</sup> NAFSA has also emphasized that studying abroad helps the national security goals of the United States by better preparing potential State Department employees with foreign language abilities and improves “the cultural and communication skills vital to our national security.”<sup>41</sup> It has been argued that studying abroad helps the United States’ position in the global economy<sup>42</sup> and, lastly, that studying abroad helps students stand out to potential employers.<sup>43</sup> With all of these articulated benefits, legislative bodies at both the state and federal levels have examined ways to promote studying abroad.

## II. STATE AND FEDERAL INVOLVEMENT IN STUDY ABROAD PROGRAMS

With many articulated benefits to studying abroad, the federal and state governments have considered legislation that largely encourages growth of the study abroad industry. In 2005, President Bush and the United States Congress appointed a seventeen-member group known as the Commission on the Abraham Lincoln Study Abroad Fellowship Program to examine ways in which to promote studying abroad by collegiate students.<sup>44</sup> In addition, legislation such as the Paul Simon Study Abroad Act has been introduced in Congress to provide more federal monetary support for educational institutions that sponsor study abroad programs through

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39. See *Advocating for Education Abroad: Benefits to Students*, NAFSA, <https://www.nafsa.org/findresources/Default.aspx?id=8361> (last visited Mar. 14, 2015).

40. See *Public Policy Benefits of Study Abroad*, NAFSA, [http://www.nafsa.org/Explore\\_International\\_Education/Advocacy\\_And\\_Public\\_Policy/Study\\_Abroad/Public\\_Policy\\_Benefits\\_of\\_Study\\_Abroad/](http://www.nafsa.org/Explore_International_Education/Advocacy_And_Public_Policy/Study_Abroad/Public_Policy_Benefits_of_Study_Abroad/) (last visited Mar. 14, 2015).

41. *Id.*

42. *Id.*

43. See Carolyn Bigda, *Studying abroad can help you stand out from peers*, CHI. TRIB. (Oct. 18, 2013), [http://articles.chicagotribune.com/2013-10-18/business/sc-cons-1017-started-20131018\\_1\\_college-students-double-majors-study-abroad](http://articles.chicagotribune.com/2013-10-18/business/sc-cons-1017-started-20131018_1_college-students-double-majors-study-abroad).

44. See Bollag, *supra* note 24.

grants.<sup>45</sup> The support does not stop at the legislative branch at the federal level; the State Department also has supported the aims of study abroad through initiatives such as the 100,000 Strong in China,<sup>46</sup> 100,000 Strong in the Americas,<sup>47</sup> and the Passport to India<sup>48</sup> programs. Finally, many state legislatures have also enacted legislation openly supporting the expansion of study abroad programs. Each of these initiatives and pieces of legislation, discussed further in the next several sections, have contributed to an overall governmental climate supportive of study abroad programs within the past decade.

While policymakers have historically focused on funding to bolster enrollment in study abroad programs, there are other challenges to boosting enrollment in study abroad programs beyond funding. A number of high school graduates who have taken several years of a foreign language in high school do not graduate high school with a fluent proficiency in a foreign language<sup>49</sup> and a number of study abroad programs require proficiency.<sup>50</sup> In addition, transfer credits sometimes create a hurdle for increasing the number of participants. Colleges and universities often will require participants in study abroad programs to obtain administrative approvals to transfer credits from other institutions.<sup>51</sup> Finally, an academic study by Dr. James Lucas has indicated that general advertising of the study abroad industry did not generally connect with males at colleges or universities in the Midwest, since the advertising focused on aspects of the study abroad experience that were not as directly linked with individual personal interests.<sup>52</sup> In addition, this same study indicated that the “males

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45. See *Senator Paul Simon Study Abroad Act*, NAFSA, [http://www.nafsa.org/Explore\\_International\\_Education/Advocacy\\_And\\_Public\\_Policy/Study\\_Abroad/Simon\\_Senator\\_Paul\\_Simon\\_Study\\_Abroad\\_Act/](http://www.nafsa.org/Explore_International_Education/Advocacy_And_Public_Policy/Study_Abroad/Simon_Senator_Paul_Simon_Study_Abroad_Act/) (last visited Mar. 14, 2015).

46. See *100,000 Strong Educational Exchange Initiatives*, U.S. DEP'T OF STATE, <http://www.state.gov/100k/> (last visited Mar. 14, 2015).

47. *Id.*

48. See *Passport to India*, U.S. DEP'T OF STATE, [http://www.state.gov/p/sca/ci/in/passport\\_to\\_india/](http://www.state.gov/p/sca/ci/in/passport_to_india/) (last visited Mar. 14, 2015).

49. See Stephen J. Pytak, *Foreign language educators encourage fluency, but students say it's a challenge*, POTTSVILLE REPUBLICAN HERALD, Dec. 18, 2011, <http://republicanherald.com/news/foreign-language-educators-encourage-fluency-but-students-say-it-s-a-challenge-1.1246439>.

50. See *Study Abroad or Study Away*, BROWN UNIV., <http://brown.edu/campus-life/support/families/about/study-abroad-or-study-away> (last visited Mar. 14, 2015).

51. *See id.*

52. See James M. Lucas, *Where Are All the males? A Mixed Methods Inquiry into Male Study Abroad Participation* 226 (2009) (unpublished Ph.D dissertation, Michigan State University) (on file with author).

The dissertation stated the following:

Males did not respond well to study abroad marketing messages and found them lacking in depth related to academics and the experiential aspects that most interest them. They sensed that the messages about study abroad promoted it as fun or that it was a cultural immersion, and based on their

wanted an experience that could help them achieve their academic and/or career goals” and that the fun and cultural learning aspects of the study abroad experience “were not important enough reasons to study abroad given other constraints, which included time away from home, family and friends; lost wages and opportunities to work.”<sup>53</sup>

A. Commission on the Abraham Lincoln Study Abroad Fellowship Program

Federal involvement in the area of study abroad began to accelerate approximately one decade ago in 2004. During the fiscal year 2004, the FY 2004 Consolidated Appropriations Act appropriated \$500,000 in federal funding to create a Commission on the Abraham Lincoln Study Abroad Program.<sup>54</sup> The Commission’s purpose was to examine the establishment of a “program to greatly expand the opportunity for students at institutions of higher education in the United States to study abroad, with a special emphasis on studying in developing nations.”<sup>55</sup> It should be noted that approximately 53.3% of participants in study abroad programs during the 2011–2012 academic year studied in Europe.<sup>56</sup>

The seventeen members of the bipartisan Commission included current and former public officials, experts in international education issues, as well as college and university presidents.<sup>57</sup> In its November 2005 report, the Commission confidently proposed a bold goal of having one million U.S. college and university students study abroad annually by the 2016–2017 academic year.<sup>58</sup> The Commission also noted that the goal of one million students was in the “national interest” of the United States.<sup>59</sup>

The Commission cited a number of reasons, several of which have also been cited by other advocates of study abroad programs, why one million U.S. students studying abroad is within the United States’ national interests. First, the Commission noted that studying abroad helps the United States retain its economic competitiveness in the global marketplace

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personal interests and situations, this impression led them either to seek more information or to feel disinterest. *Id.*

53. *Id.* at 225.

54. *See* Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, 118 Stat. 3 (2004).

55. *See* S. REP. NO. 110-272, at 2 (2008).

56. *See* “Fast Facts”, *supra* note 15, at tbl. L.

57. *See* Commission on the Abraham Lincoln Study Abroad Fellowship Program, *Global Competence & National Needs: One Million Americans Studying Abroad* (Nov. 2005), available at <http://www.aplu.org/document.doc?id=190>.

58. *Id.* at vii.

59. *Id.* at v.

and assists in the development of students' employment skills.<sup>60</sup> In addition, the Commission also remarked that increasing the number of students studying abroad has a direct role in promoting United States foreign policy interests, specifically, bolstering the United States' leadership role in the world,<sup>61</sup> fostering the development of foreign language skills,<sup>62</sup> and fostering cultural understanding among the nations of the world.<sup>63</sup> Finally, the Commission also stated that studying abroad has a positive educational value for students.<sup>64</sup>

To meet the goal of sending one million college and university students abroad to study, the Commission proposed the establishment of Lincoln fellowships and scholarships.<sup>65</sup> It envisioned that some of the awards would be available directly to students and others through individual educational consortia and institutions, as well as nonprofit organizations, but that at least 88 percent of all funding for the Lincoln program goes directly to students.<sup>66</sup> Scholarships under the program would be available both as need-blind and merit-based awards for study abroad experiences in which a student earns more than three academic credit hours but less than twelve hours.<sup>67</sup> In contrast, fellowships would be limited for students who study abroad for more than twelve academic credit hours and would be awarded on the basis of merit.<sup>68</sup> In addition, the Commission expressed its intention that a "substantial" number of the awardees should be those who are studying abroad in nontraditional countries<sup>69</sup> and that foreign language

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60. *Id.* at vi ("Increasingly, business leaders recognize that they must be able to draw on people with global skills if their corporations are to succeed in a world in which one American job in six is tied to international trade").

61. *Id.* at vi ("The United States leads by necessity and default, but it is not as well equipped to exercise its leadership role as it could be. This is not an issue of the left or the right, of Democrats or Republicans. It is an issue of how we as a society prepare this and future generations for the leadership that will be required for the American democratic experiment's ongoing success in the world").

62. *Id.* ("In today's world, study abroad is simply essential to the nation's security. More than 65 federal agencies, ranging from the Central Intelligence Agency to the Peace Corps, need to fill 34,000 positions requiring foreign language skills annually – a requirement that is often unmet or filled only through outside contractors").

63. *Id.* at vii ("Wise stewardship also involves encouraging foreign students to come to the United States for study. Maintaining access to the American campus for the students of the world remains a significant foreign policy tool. Student exchange provides benefits to host and sending nations").

64. *Id.* at vi–vii.

65. *Id.* at 25.

66. *Id.* at 27.

67. *Id.* at xi.

68. *Id.*

69. *Id.* at 27.

study would be “strongly encouraged.”<sup>70</sup> Finally, the Commission acknowledged there were several possibilities for the administration of the program. One possibility expressed was that the Lincoln program could be a part of either the Department of State or Department of Education, with a recommendation that a policy advisory council assist in its implementation.<sup>71</sup> Another idea mentioned by the Commission was that the Lincoln program could justify the need for an independent Lincoln Commission on Study Abroad, which could be organized similar to the structure of the Millennium Challenge Corporation.<sup>72</sup>

Several months after the release of the report, one of the Commission’s members, Senator Richard Durbin of Illinois, introduced legislation along with Senator Norm Coleman of Minnesota in an effort to put the recommendation of establishing a Lincoln study abroad program into reality. The legislation, entitled the Abraham Lincoln Study Abroad Act of 2006, sought to establish Lincoln Fellowships for undergraduates to study abroad, which would be awarded by the United States Secretary of State.<sup>73</sup> While the legislation did not explicitly outline many proposed rules concerning the fellowship, the bill delineated two rules – that the fellowships awarded “reflect the demographics of the United States undergraduate population” and that there be an annual increase in the number of fellowship recipients studying abroad in nontraditional locations.<sup>74</sup> Despite having forty-five cosponsors, the bill never made it out of the Senate committee stage.<sup>75</sup>

#### B. Senator Paul Simon Study Abroad Foundation Act

In the following Congress, another bipartisan effort emerged to create a study abroad foundation with the intention of turning the Lincoln Commission’s recommendations into reality. Within the first three months of the 110th Congress, Democratic Representative Tom Lantos and Republican Representative Ileana Ros-Lehtinen introduced H.R. 1469, the Senator Paul Simon Study Abroad Foundation Act of 2007.<sup>76</sup>

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70. *Id.* at 28.

71. *Id.* at 30.

72. *Id.* For more information on the Millennium Challenge Corporation, which is an independent federal agency that promotes international development, see Stephen Marks, *The Human Right to Development: Between Rhetoric and Reality*, 17 HARV. HUM. RTS. J. 137 (2004) (discussing generally the Millennium Challenge Account and Millennium Challenge Corporation and how it contributes to the “right to development” of international law).

73. Abraham Lincoln Study Abroad Act of 2006, S. 3744, 109th Cong. (2006) [hereinafter Abraham Lincoln Study Abroad Act of 2006].

74. *Id.* at § 4(b).

75. *Id.*

76. Senator Paul Simon Study Abroad Foundation Act of 2007, H.R. 1469, 110th

Approximately fifteen days following its introduction in the United States House of Representatives, a bipartisan companion measure in the United States Senate was introduced by Democratic Senator Dick Durbin and Republican Senator Norm Coleman.<sup>77</sup> The legislation sought to create a “Senator Paul Simon Study Abroad Foundation” which would be a government corporation housed by the executive branch.<sup>78</sup> Governance of the foundation would be conducted by a Board of Directors, and chaired by either the United States Secretary of State or a designee of the Secretary.<sup>79</sup>

In accordance with the recommendations of the Lincoln Commission on Study Abroad, the Senator Paul Simon Study Abroad Foundation Act’s purpose was to award grants to United States students to pursue study abroad opportunities.<sup>80</sup> Similar to the goals of the Abraham Lincoln Study Abroad Act of 2006, the Senator Paul Simon Study Abroad Foundation Act also included an objective that a significant number of grants awarded to students should be given to students studying in nontraditional countries as well as developing nations.<sup>81</sup> The legislation also authorized an initial appropriation of \$80 million in the fiscal year 2008 to establish the foundation,<sup>82</sup> and included provisions to allow the proposed foundation to solicit private donations and engage in fundraising in order to raise money for study abroad grants.<sup>83</sup>

Within three months of the introduction of the legislation, the Senator Paul Simon Study Abroad Foundation Act of 2007 passed the United States House of Representatives by a voice vote.<sup>84</sup> It also sailed through the United States Senate Committee on Foreign Relations with a voice vote.<sup>85</sup> Despite widespread support for the legislation, it did not advance for a vote in the full Senate in the 110th Congress and did not become law.<sup>86</sup> In the 111th Congress, the legislation made it through the United States House of Representatives<sup>87</sup> as part of the Foreign Relations Authorization Act for the

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Cong. (2007) [hereinafter Senator Paul Simon Study Abroad Foundation Act of 2007].

77. *See id.*

78. *See id.*

79. *Id.* at § 5(a)(2).

80. *Id.* at § 6(a)(2)(A).

81. *Id.* at § 6(b)(3).

82. *Id.* at § 10(a).

83. *Id.* at § 5(b)(4).

84. *See* S. Rep. No. 110-272 (2008).

85. *Id.* at 2.

86. *See Background on the Senator Paul Simon Study Abroad Foundation*, NAFSA,

[http://www.nafsa.org/Explore\\_International\\_Education/Advocacy\\_And\\_Public\\_Policy/Study\\_Abroad/Simon/Background\\_on\\_the\\_Senator\\_Paul\\_Simon\\_Study\\_Abroad\\_Foundation/](http://www.nafsa.org/Explore_International_Education/Advocacy_And_Public_Policy/Study_Abroad/Simon/Background_on_the_Senator_Paul_Simon_Study_Abroad_Foundation/) (last visited Jan. 19, 2015).

87. *See House Passes Simon Study Abroad Bill in Major Step Forward for International Education*, NAFSA (June 11, 2009), <http://blog.nafsa.org/2009/06/11/>.

Fiscal Years 2010 and 2011,<sup>88</sup> but it once again failed to make it through the Senate. To date, despite strong bipartisan congressional support, the legislation has failed to make it fully through the legislative process.

Although the Abraham Lincoln Study Abroad Act and the Senator Paul Simon Study Abroad Foundation Act have not been implemented into law as of this time, the legislative branch has been generally supportive of the goals of increasing participation among college and university students in study abroad programs. A significant amount of support has also been present at the executive branch level through the public pronouncements of individuals associated with the Obama administration, as well as through initiatives of the State Department.

C. Public Pronouncements and State Department Initiatives (100,000 strong in China; 100,000 strong in the Americas; Passport to India)

In recent years, the administration of President Barack Obama has largely given a strong rhetorical endorsement of the goal to increase the number of students studying abroad. Within President Obama's first several months in office, at a student roundtable in Turkey, the President strongly endorsed studying abroad, stating that "simple exchanges can break down walls between us, for when people come together and speak to one another and share a common experience, then their common humanity is revealed."<sup>89</sup> In addition, in a January 19, 2011 speech at Howard University, First Lady Michelle Obama referred to studying abroad as a "key component" of the foreign policy agenda of the Obama administration.<sup>90</sup> Finally, within the past year the First Lady has also remarked in an interview that "the benefits of studying abroad are almost endless."<sup>91</sup>

The Obama administration has not only expressed support for study abroad programs through rhetorical means; it has also taken concrete steps at the executive branch level through initiatives to increase the number of American students abroad. Within the first year of his first term in office,

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88. See Foreign Relations Authorization Act, Fiscal Years 2010 and 2011, H.R. 2410, 111th Cong. (2009).

89. See President Barack Obama, *Remarks of President Barack Obama at Student Roundtable*, WHITE HOUSE (Apr. 7, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-Of-President-Barack-Obama-At-Student-Roundtable-In-Istanbul](http://www.whitehouse.gov/the_press_office/Remarks-Of-President-Barack-Obama-At-Student-Roundtable-In-Istanbul).

90. See Office of the First Lady, *Remarks by the First Lady at her "100K strong" State Visit Event*, WHITE HOUSE (Jan. 19, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/01/19/remarks-first-lady-her-100k-strong-state-visit-event>.

91. See Jareen Imam, *Studying abroad could give you an edge in the job market*, CNN (Apr. 4, 2014), <http://www.cnn.com/2014/03/25/travel/irpt-study-abroad/index.html>.



in November 2009 President Obama formally unveiled a proposed “100,000 Strong” initiative to drastically increase the number of American students studying in China.<sup>92</sup> In his remarks before an audience that included young Chinese leaders, President Obama stressed the significance of “sustaining an open dialogue”<sup>93</sup> to provide for both the prosperity and security<sup>94</sup> of both the United States and China. In addition, President Obama cited the historical relationship between the United States and China in stating that a cooperative relationship between the two countries traditionally has “accompanied a period of positive change.”<sup>95</sup> Increasing the number of students studying abroad would constitute, at the very least, a part of encouraging that cooperative relationship.

Initiatives by the Obama administration to bolster study abroad have not only included efforts to increase study abroad to China, but also to other developing parts of the world as well. Less than two years after unveiling the “100,000 Strong” initiative with China, in early 2011 the Obama administration announced the “100,000 Strong in the Americas” initiative to drastically increase the number of students studying abroad in the Caribbean as well as Latin America.<sup>96</sup> The “100,000 Strong in the Americas” initiative not only has a goal of placing 100,000 American students in study abroad placements in Latin America and the Caribbean by 2020, but also that 100,000 students from Latin America and the Caribbean study in placements within the United States.<sup>97</sup> Finally, the United States Department of State also manages the “Passport to India” initiative, an initiative which began in early 2012 with a goal of increasing the number of American students not only studying abroad in India, but also gaining internship experience in the country as well.<sup>98</sup>

While all of these general study abroad initiatives have received strong rhetorical backing from policymakers at the federal government level, the main question is where the financial backing for all of these efforts will come from. The Paul Simon Study Abroad Act has failed to make it through both houses of Congress in recent Congresses, thus significant funding has yet to be appropriated by Congress for all of the initiatives.

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92. See President Barack Obama, *Remarks by President Barack Obama at Town Hall Meeting with Future Chinese Leaders*, WHITE HOUSE (Nov. 16, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-barack-obama-town-hall-meeting-with-future-chinese-leaders>.

93. *Id.*

94. *Id.* (“Indeed, because of our cooperation, both the United States and China are more prosperous and more secure”).

95. *Id.*

96. See *100,000 Strong Educational Exchange Initiatives*, *supra* note 46.

97. See *100,000 Strong in the Americas*, U.S. DEP’T OF STATE, <http://www.state.gov/p/wha/rt/100k/index.htm> (last visited Mar. 14, 2015).

98. See *Passport to India*, *supra* note 48.

Moving forward in the future, in a time where congressional gridlock is not too uncommon with debates over the federal budget<sup>99</sup> and budgetary requests are viewed under a careful congressional lens, it appears that such funding for study abroad initiatives will come from private sources.<sup>100</sup>

Each of the Obama administration's study abroad initiatives within the past several years (100,000 Strong, 100,000 Strong in the Americas, and Passport to India) are being funded through private sources. The 100,000 Strong initiative, which seeks to increase the number of American students studying abroad in China, is no longer managed directly by the United States Department of State and instead is managed through an independent 100,000 Strong Foundation.<sup>101</sup> A number of private companies and organizations are members of the Founder's Circle, including the Ford Foundation, Florence Fang Family Foundation, Citi, Coca-Cola, Laureate International Universities, Caterpillar, Wanxiang Group, and World Strides.<sup>102</sup> The 100,000 Strong in the Americas initiative now primarily depends upon public-private partnerships for financially supporting the initiative's goals<sup>103</sup> and the Passport to India program fully relies on private sector support.<sup>104</sup>

Despite questions as to whether the source of the future funding to promote study abroad will come primarily from private sources or from the federal government, rhetorically both the legislative and executive branches

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99. See Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction*, 88 NOTRE DAME L. REV. 2217, 2217 (2013) ("Gridlock not only makes the arbitrary exercise of governmental power more likely, but also implicates a new concern: the problem of arbitrary inaction. From tax cuts and the budget deficit, to immigration policy, to taking up key executive and judicial nominations, gridlock prevents Congress from acting on matters that undoubtedly rest within the proper realm of the federal government").

100. See Karin Fischer, *As White House Pushes Study Abroad in China*, CHRON. HIGHER EDUC. (Jan. 19, 2011), available at <http://chronicle.com/article/As-White-House-Pushes-Study/125999/>.

101. See *About Us*, 100,000 STRONG FOUNDATION, <http://100kstrong.org/about-us/> (last visited Jan. 19, 2015).

102. *Supporters*, 100,000 STRONG FOUNDATION, available at <http://100kstrong.org/about-us/supporters/> (last visited Jan. 19, 2015).

103. See *100,000 Strong in the Americas*, *supra* note 97 ("To implement the President's vision, the Department of State established a public-private partnership with *NAFSA: Association of International Educators*, the world's largest nonprofit association dedicated to international education, and *Partners of the Americas*, a leading voluntary and development agency with over 45 years of experience in the Americas. Our matching grant program leverages private and corporate giving so that universities and colleges can expand study abroad programs and make international study more broadly available. This unique public-private partnership will educate and prepare tomorrow's leaders through today's investment by corporations, schools, and governments who understand the value of connecting the hemisphere through its young people").

104. See *Passport to India*, *supra* note 48.

have been supportive of promoting study abroad programs and major policymakers have not seemed to emphasize any potential risks.

#### D. State Legislation Encouraging Study Abroad Programs

In addition to the legislation and initiatives introduced at the federal level, a number of states have had legislatures pass international education resolutions that encourage an increase in the number of American students studying abroad. According to NAFSA, at least twenty-three states have had at least one state legislative body pass a resolution recognizing the importance of international education programs.<sup>105</sup> Some of the resolutions encourage state higher education institutions not only to promote opportunities for students to study abroad, but to develop more courses in foreign languages and courses in the studies of foreign nations. For example, Nevada's Senate Concurrent Resolution No. 38, enacted in 2005, not only specifically promoted the development of study abroad opportunities for students, but also for the state's colleges and universities to "develop courses of studies in as many fields as possible to increase students' understanding of global issues and cultural differences."<sup>106</sup> In addition, the resolution also specifically called for the development of more courses in the study of foreign languages.<sup>107</sup>

While many of these resolutions are largely hortative and do not provide funding earmarked for the development and expansion of study abroad programs specifically, they are indicative of a general trend among many states (as well as the legislative and executive branches of the federal government) that, in principle, studying abroad is a positive experience with many economic, cultural and social benefits. Despite the many claimed benefits of studying abroad, studying abroad is not an experience completely free from risk by any of the participants, nor are all educational and other nongovernmental entities who sponsor study abroad programs completely insulated from any and all potential liability for incidents that may occur overseas. In certain cases, particularly in some developing nations, the risks might very well be significant.

### III. RISKS IN STUDY ABROAD PROGRAMS

A large percentage of American college and university students who study abroad generally report having positive experiences abroad. Two

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105. See *State-level International Education Resolutions*, NAFSA, [https://www.nafsa.org/Explore\\_International\\_Education/Advocacy\\_And\\_Public\\_Policy/State\\_Level\\_Initiatives/State-level\\_International\\_Education\\_Resolutions/#Florida](https://www.nafsa.org/Explore_International_Education/Advocacy_And_Public_Policy/State_Level_Initiatives/State-level_International_Education_Resolutions/#Florida) (last visited Jan. 19, 2015).

106. See S. Con. Res. 38, 73rd Sess. (Nev. 2005), available at [https://www.nafsa.org/\\_/File/\\_/nevada\\_resolution.pdf](https://www.nafsa.org/_/File/_/nevada_resolution.pdf).

107. *Id.*

researchers with the Institute for the International Education of Students published the results of a landmark survey of approximately 17,000 former study abroad alumni in 2009 in the *Journal of Studies in International Education*.<sup>108</sup> The survey involved participants who studied abroad through programs associated with the Institute for the International Education of Students from 1950 to 1999.<sup>109</sup> The results of the survey indicated that a number of the respondents apparently experienced positive results for future career options following participation in study abroad programs. For example, 84% of global-career respondents and 69% of nonglobal-career respondents indicated that studying abroad “Allowed me to acquire a skill set that influenced my career path.”<sup>110</sup> The authors concluded that “studying abroad truly does change one’s life” and that the results indicated “a sequence that students make, beginning with the resolution to study abroad that correlates with the lasting effect of developing a career with a global focus.”<sup>111</sup>

There likely are other positive results that are not captured in the Institute for the International Education of Students survey, such as the possibility that lifelong intercultural friendships may be formed and the immeasurable experience of living in a foreign country. But amidst all of these positive aspects of studying abroad lie risks of various types. The risks of physical injury, sexual assault, abduction, extortion and kidnapping exist throughout the world. By studying abroad, a participant may also take the possible risk that medical care may not be as accessible as it is in one’s home institution. And in several cases, some of which have occurred in the last few years, students have died abroad while participating in study abroad programs. A wide variety of risks are present with overseas study abroad programs.<sup>112</sup>

Study abroad liability, however, has thus far remained a fairly amorphous area of doctrine in American jurisprudence as there are few

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108. See Emily Mohajeri Norris & Joan Gillespie, INSTITUTE FOR THE INTERNATIONAL EDUCATION OF STUDENTS, *How Study Abroad Shapes Global Careers: Evidence From the United States*, 13 JOURNAL OF STUD. IN INT’L EDUC. 382 (2009).

109. *Id.* at 382.

110. *Id.* at 390.

111. *Id.* at 395.

112. See *Safety in Study Abroad Programs: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Education and the Workforce*, 106th Con. (Oct. 4, 2000) (statement of Mr. Brett Laquercia, Director, Business Development, Security Services, Kroll Risk Consulting Services, Inc.).

Mr. Laquercia stated the following in his testimony: “What are the risks that study abroad programs ought to anticipate and be prepared to mitigate and respond to? Simply stated, these risks include natural disasters; unsafe road and rail transit; terrorist acts; petty crime; carjacking; kidnapping; rape; homicide; civil unrest; coups d’état; extortion; official corruption; health hazards, and other threatening or disruptive situations.”

reported cases dealing with such liability. Yet, these risks have not gone without some type of response. Best practices have developed within the study abroad industry to attempt to minimize risks overseas. Educational and nongovernmental institutions have also adopted other risk management techniques, including expanding insurance options and implementing various safety standards for participants. Congress has investigated issues of safety in study abroad programs,<sup>113</sup> and organizations such as the Clear Cause Foundation are calling for increased transparency concerning the risks involved in study abroad programs.<sup>114</sup> The risks may present themselves in several different forms.

### A. Major Types of Risks Potentially Involved

#### 1. Physical Injuries

The risk of general physical injury is an ever-present one for American students studying abroad. A general physical injury potentially can occur during sponsored program activities, or an injury might result allegedly due to the actions of others in a program. One of the early reported cases addressing liability in an overseas program, *Furrh v. Arizona Board of Regents*, involved allegations by a participant of assault by fellow participants during an ecology field trip in Mexico.<sup>115</sup> In *Furrh*, a university professor took students on a university-sponsored ecology field trip to Baja California, Mexico.<sup>116</sup> The crux of the plaintiff's allegations in *Furrh* involved assertions that the professor and another employee of the university assaulted him and unlawfully restrained him during the trip.<sup>117</sup> The trial court found for the defendants on the basis that the plaintiff created a potentially serious harm to others on the trip due to an apparent chronic mental and emotional disorder,<sup>118</sup> and that the defendants' actions in restraining the plaintiff until his father arrived were protective measures for others in the group.<sup>119</sup> On appeal, the Arizona Court of Appeals upheld the trial verdict for the defendants, holding "that where a person is a danger to himself or others because of his mental condition, that it is lawful to restrain him so long as necessary until other lawful measures can be followed."<sup>120</sup> Of particular note, the incidents alleged in *Furrh* occurred in a remote desert area of Baja California and that testimony revealed that the

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113. *See generally id.*

114. *See About Us*, CLEAR CAUSE FOUND., <http://clearcausefoundation.org/about-us/> (last visited Jan. 19, 2015).

115. *See Furrh v. Ariz. Bd. of Regents*, 676 P.2d 1141 (Ariz. Ct. App. 1983).

116. *Id.* at 1142.

117. *Id.*

118. *Id.*

119. *Id.* at 1144.

120. *Id.* at 1146.

dangers of cholla cactus and rattlesnakes were around the group.<sup>121</sup>

General physical injuries may result from hazardous conditions in the region where the participant is studying. Some of these may result in the loss of life. The 1996 incident where four American students lost their lives studying abroad in India took place on a bus, which was allegedly traveling on treacherous roads.<sup>122</sup> In a 1997 incident, an Ohio State University student died following altitude sickness after an expedition in the Himalayas apparently run by a university professor.<sup>123</sup> In late 2012, as mentioned earlier, a University of Virginia student died while in a boating accident in the Caribbean.<sup>124</sup>

## 2. Sexual Harassment and Sexual Assaults

It has been reported that approximately one in four women will have experienced a sexual assault while attending a college or university.<sup>125</sup> The problem of sexual assault is not one that only occurs on college and university campuses within the United States; incidents have reportedly occurred abroad as well. In one tragic 1998 case, five female students from St. Mary's College of Maryland were raped in a remote area of Guatemala after their bus was stopped by a group of bandits.<sup>126</sup> Incidents of sexual harassment and sexual assaults abroad, just like the risk that participants incur other physical injuries, can increase a college or university's exposure to potential liability through an overseas study abroad program.

Reported cases including allegations of negligence against colleges or universities following reported sexual harassment and sexual assault abroad have concluded with varying liability outcomes. In the case of state colleges or universities, sovereign immunity may apply. Traditionally, states enjoyed the broad protection of sovereign immunity.<sup>127</sup> Today, each of the fifty states has a statute, which at least partially waives a state's sovereign immunity in certain cases.<sup>128</sup> A number of individual states confer immunity to states or state entities in cases of a state or state entity exercising "discretionary" functions, as opposed to cases where a state

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121. *Id.* at 1142.

122. *See* Amato, *supra* note 1.

123. *See* French, *supra* note 6.

124. *See* Valentine, *supra* note 8.

125. *See* Justin Neidig, Note, *Sex, Booze, and Clarity: Defining Sexual Assault on a College Campus*, 16 WM. & MARY J. WOMEN & L. 179 (2009).

126. *See* French, *supra* note 6.

127. *See* Karen J. Kruger, *Governmental Immunity in Maryland: A Practitioner's Guide to Making and Defending Tort Claims*, 36 U. BALT. L. REV. 37, 44 (2006).

128. *See* Cassandra R. Cole & Chad G. Marzen, *A Review of State Sovereign Immunity Statutes and the Management of Liability Risks by States*, 32 J.OF INS. REG. 44, 48 (2012).

government or state entity's actions are "ministerial" or "operational" in character.<sup>129</sup>

The case of *Bloss v. University of Minnesota Board of Regents* involved application of the state of Minnesota's sovereign immunity statute following allegations by a student of a sexual assault while participating in a university-sponsored study abroad program.<sup>130</sup> In *Bloss*, a student who was participating in a study abroad program in Cuernavaca, Mexico through the University of Minnesota was reportedly raped by a taxi driver on the way from a social event to the home of her host family.<sup>131</sup> The student claimed the university was negligent in several ways concerning the study abroad program, including allegedly failing to secure a host family closer to the study abroad campus, failing to provide transportation, failing to warn, and failing to protect participants from foreseeable injuries.<sup>132</sup> While the student had signed an exculpatory clause prior to participation and the university raised the release as a defense at the trial level, the Minnesota Court of Appeals focused on the defense of sovereign immunity in its analysis after the trial court held the release was overbroad and that sovereign immunity did not apply as it held the university's conduct at issue was "ministerial" in nature.<sup>133</sup>

On appeal, the Minnesota Court of Appeals held Minnesota's sovereign immunity statute applied to bar plaintiff's claims against the university.<sup>134</sup> Minnesota is one of the states that distinguishes between discretionary duties of state officials and agents, which are "planning level" activities, versus "operational level" activities.<sup>135</sup> If an activity is a "planning level" activity, immunity is conferred; however, immunity does not apply to "operational level" activities.<sup>136</sup>

As to the plaintiff's allegations concerning the proximity of student housing, the Court found that housing decisions of the university were "planning" and involve "cost balancing, housing market considerations, and social and educational consequences."<sup>137</sup> The Minnesota Court of Appeals also held that transportation decisions were "planning" and involve similar policy considerations, and that the university generally is

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129. See *State Sovereign Immunity and Tort Liability*, NAT'L CONF. OF STATE LEGISLATURES (Sept. 8, 2010), [http://www.ncsl.org/research/transportation/state-sovereign-immunity-and-tort-liability.aspx#Note\\_1](http://www.ncsl.org/research/transportation/state-sovereign-immunity-and-tort-liability.aspx#Note_1).

130. See *Bloss v. Univ. of Minn. Bd. of Regents*, 590 N.W.2d 661 (Minn. Ct. App. 1999).

131. *Id.* at 662–63.

132. *Id.* at 663.

133. *Id.*

134. *Id.* at 667.

135. *Id.* at 664; see also generally MINN. STAT. § 3.736 (2013).

136. *Bloss v. Univ. of Minn. Bd. of Regents*, 590 N.W.2d 661, 664 (Minn. Ct. App. 1999).

137. *Id.* at 665.

“protected from litigation that seeks to interfere with its discretionary functions in designing and constructing an academic program.”<sup>138</sup> Finally, the Court noted that the university provided information concerning safety at an orientation session, and for the Court “[t]o rebalance the extent of the warnings would represent judicial interference with executive policy-making. . . .”<sup>139</sup> Thus, the Minnesota Court of Appeals reversed the trial court’s denial of sovereign immunity and in essence protected the university from liability in the case.<sup>140</sup>

Outside of potential general negligence liability a private or public college or university might incur concerning a study abroad program, with regard to the risk of sexual harassment and sexual assaults, a college or university receiving federal financial assistance may incur liability under Title IX. Despite the presence of a potential Title IX liability risk, the contours and application of such liability are unsettled. Under 20 U.S.C. § 1681, “No person in the United States shall, on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”.<sup>141</sup> It is an unsettled question of law as to whether Title IX has extraterritorial application to campuses abroad that host study abroad programs.

In perhaps the first reported case on the question of the application of Title IX to a study abroad program overseas, the United States District Court for the Eastern District of Michigan held Title IX applied to a college or university-sponsored study abroad program in South Africa in *King v. Board of Control of Eastern Michigan University*.<sup>142</sup> In the *King* case, several female students sued a state university after they alleged several students on the same five-week study abroad program in South Africa sexually harassed them.<sup>143</sup> The female students alleging the harassment also claimed the university professor on the trip and the university in general did not take appropriate actions to address the harassment.<sup>144</sup> In holding that Title IX applied to the allegations in the case, the *King* court focused on the textual language of 20 U.S.C. § 1681, holding that it applies to “any education program or activity.”<sup>145</sup> In addressing the university’s argument, which focused on the textual language “no person in the United States,” the Court reasoned that “study abroad programs are operations of

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138. *Id.* at 665–66.

139. *Id.* at 666.

140. *Id.* at 667.

141. 20 U.S.C. § 1681 (2014).

142. *See King v. Bd. of Control of Eastern Mich. Univ.*, 221 F. Supp. 2d 783, 791 (E.D. Mich. 2002).

143. *Id.* at 784.

144. *Id.* at 785–86.

145. *Id.* at 788.



the University which are explicitly covered by Title IX and which *necessarily* require students to leave U.S. territory in order to pursue their education.”<sup>146</sup>

While the court in *King* extended Title IX liability to cover allegations of sexual harassment which occur in a college or university-sponsored study abroad program, it is important to note that the allegations in *King* involved sexual harassment by participants in a study abroad program against other participants in the same program. That leaves a question as to whether Title IX applies extraterritorially in a situation where a third party, unaffiliated with the study abroad program, sexually harasses or sexually assaults a participant(s) of a study abroad program overseas.

The United States Western District of Kentucky answered this question in the negative in *Mattingly v. University of Louisville*.<sup>147</sup> In *Mattingly*, a female student and participant in a university-sponsored study abroad program claimed she was raped by a Portuguese man unaffiliated with the university or the study abroad program.<sup>148</sup> Interpreting a series of Title IX decisions, the *Mattingly* court noted the university could only be held liable for harassment or assault by a third party if it has actual notice of the harassment or assault and then acts with “deliberate indifference” in responding to the notice.<sup>149</sup> Examining the facts of *Mattingly*, the Western District of Kentucky noted that the case before it appeared to be the first case involving a sexual assault by a third party<sup>150</sup> in that particular university program,<sup>151</sup> and that no evidence was presented to the court which indicated a “clearly unreasonable” response by the university.<sup>152</sup> However, the *Mattingly* court left open the possibility that if a university or college “knows of repeated incidents of harassment,” liability under Title IX could occur.<sup>153</sup> Just over one year following the *Mattingly* court’s

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146. *Id.*

147. *See Mattingly v. Univ. of Louisville*, No. 3:05CV-393-H, 2006 WL 2178032, at \*5 (W.D. Ky. July 28, 2006).

148. *Id.* at \*1.

149. *Id.* at \*4.

150. For a more extensive discussion concerning the issue of sexual harassment by third-parties, *see* Robert J. Aalberts & Lorne H. Seidman, *Sexual Harassment of Employees by Non-Employees: When Does the Employer Become Liable?*, 21 PEPP. L. REV. 447, 451 (1994) (comprehensively addressing the issue of sexual harassment by third-parties and proposing a policy “for preventing and handling this type of employee sexual harassment.”).

151. *See Mattingly*, 2006 WL 2178032, at \*5.

152. *Id.* at \*4.

153. *Id.* at \*5 (“The situation could be different if a third-party harasser like [name of alleged harasser] assaulted U of L students on more than one occasion. In that situation, a college or university would have considerably more control over the

decision, the United States District Court for the Eastern District of New York also held that Title IX did not apply extraterritorially.<sup>154</sup>

The split in caselaw concerning Title IX liability leaves many future questions of a college or university's study abroad liability for sexual harassment or assaults. The *King* case opens the door for Title IX claims when the alleged sexual harassment or assault is committed by participants in a study abroad program against other participants. As *Mattingly* seems to indicate, if a college or university knows of multiple instances of sexual harassment or assault of participant(s) in a study abroad program, then Title IX liability may result from acts of unaffiliated third parties. In cases involving state colleges or universities, sovereign immunity may apply to—in effect—bar negligence or Title IX claims for discretionary decisions of a college or university concerning a study abroad program.

### 3. Medical Care

Another potential risk of liability colleges or universities may face is that of securing and ensuring adequate medical care is available for participants in a study abroad program. In some locations, this may be difficult to do. However, at least one court<sup>155</sup> has juxtaposed allegations of a failure to supervise medical care for a participant to the *in loco parentis* doctrine.<sup>156</sup> The case of *McNeil v. Wagner College* involved a student who slipped and fell on ice during an overseas program in Austria arranged by her college.<sup>157</sup> The plaintiff apparently suffered nerve damage following the incident and alleged the college negligently supervised medical care for her in Austria.<sup>158</sup> In upholding a trial court's summary judgment for the college, an appellate court in New York noted that New York previously rejected the *in loco parentis* doctrine for college and university students and that a duty of the overseas program to supervise the plaintiff's health

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context in which the alleged harassment occurs. Where a college or university knows of repeated instances of harassment, it has the ability and the duty to take added safety precautions and to assert strict control over the behavior of its own students in order to prevent further abuse in the future. The Court expresses no opinion about a college or university's liability in that situation.”).

154. See *Phillips v. St. George's Univ.*, No. 07-CV-1555, 2007 WL 3407728, at \*4 (E.D.N.Y. Nov. 15, 2007).

155. See *McNeil v. Wagner College*, 667 N.Y.S.2d 397, 398 (App. Div. 1998).

156. See John E. Rumel, *Back to the Future: The In Loco Parentis Doctrine and Its Impact on Whether K-12 Schools and Teachers Owe a Fiduciary Duty to Students*, 46 IND. L. REV. 711, 713 (2013) (“*In loco parentis* literally means ‘in the place of a parent.’ The doctrine, according to its generally accepted common law meaning, refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption. It embodies the two ideas of assuming the parental status and discharging the parental duties.”).

157. See *McNeil*, 667 N.Y.S.2d at 398.

158. *Id.*

care did not exist because of the rejection of the doctrine.<sup>159</sup>

#### 4. Abduction and Kidnapping

In many developing and least developed nations, foreign travelers, tourists and students may be at risk for abduction, extortion or kidnapping. While accurate worldwide statistics on kidnappings and abductions are difficult to compile, as most victims do not report the crime, in 2012 the *New York Times* reported that kidnappings worldwide are on the rise.<sup>160</sup> Nearly seventy-five percent of all kidnappings occur in Latin America,<sup>161</sup> and many drug cartels and other criminal gangs in Latin America have moved from the business of drugs into kidnappings for ransom.<sup>162</sup> While a vast majority of kidnappings do not involve study abroad participants, the “express kidnapping” phenomenon is a potential risk.<sup>163</sup> In an “express kidnapping,” a person is typically abducted, held up over a threat of violence and forced to pay a quick ransom.<sup>164</sup>

The emerging market of kidnapping and ransom insurance policies offer one response to the potential threat of kidnappings and abduction abroad.<sup>165</sup> The key benefit of a kidnapping and ransom insurance policy is that it can secure reimbursement of costs of a ransom amount,<sup>166</sup> among other

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159. *Id.*

160. See David Wallis, *The Business of Dealing with Kidnapping Abroad*, N.Y. TIMES, May 2, 2012, [http://www.nytimes.com/2012/05/03/business/kidnapping-becomes-a-growing-travel-risk.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/05/03/business/kidnapping-becomes-a-growing-travel-risk.html?pagewanted=all&_r=0).

161. See Caroline Gray McGlamry, Note, *Kidnappers Without Borders: An Epidemic in Need of Global Solutions*, 40 GA. J. INT'L & COMP. L. 807, 809 (2012) (“Among the areas of the world where this practice has become most prevalent, Latin America stands out as the most dangerous for kidnappings. Although Latin America constitutes only about 8% of the world’s population, almost 75% of all kidnappings take place there, including 80% of kidnappings-for-ransom.”).

162. See Darren Prum & Chad G. Marzen, *Set Up for Abduction and Extortion by the IRS: Does the Reporting of Interest Paid on U.S. Bank Deposits Undermine the Government’s Obligation to Avoid Instigating Terrorism by Foreign Criminal Gangs and Drug Cartels?*, 20 TEX. HISP. J.L. & POL’Y 1, 22 (2014).

163. See *What is the Crisis Response Benefit?*, HCC MEDICAL INSURANCE SERV., <https://www.hccmis.com/what-is-the-crisis-response-benefit/index.html> (last visited Mar. 4 2015).

164. *Id.*

HCC Medical Insurance Services notes that “The University of California warns students in its study abroad program of the growing frequency of express kidnappings. This could occur when a seemingly trustworthy native temporarily abducts and forces an unsuspecting student to surrender an easily-accessible ransom in exchange for release.” *Id.*

165. See Wallis, *supra* note 160 (reporting that “insurance companies say business [in kidnapping and ransom insurance] is brisk.”).

166. See Samantha Kenney, Comment, *Regional Shortcomings and Global Solutions: Kidnap, Ransom and Insurance in Latin America*, 14 CONN. INS. L.J. 557, 559 (2008).

kidnapping and abduction-related expenses that may be incurred by the family and/or loved ones of an individual kidnapped or abducted.<sup>167</sup> A number of colleges and universities are also procuring kidnapping and ransom insurance policies to cover participants in study abroad programs. A 2007 article in the *Chronicle of Higher Education* noted the purchases of kidnapping and ransom insurance coverage by colleges and universities to cover study abroad programs generally have increased,<sup>168</sup> recognizing a salient risk for study abroad program participants.

### 5. Accommodation of Disabilities

Another area where a college or university may incur liability concerning the operations of a study abroad program is through inadequate accommodation of participants with disabilities. Such liability may occur through the Rehabilitation Act, Americans with Disabilities Act, or through state law claims typically sounding in negligence or through a breach of duty. The case of *Bird v. Lewis & Clark College* illustrates the potential liability a college or university may incur through federal and state law.<sup>169</sup> In the *Bird* case, a paraplegic student alleged that her college violated the Rehabilitation Act, Americans with Disabilities Act, and breached its fiduciary duties in failing to reasonably accommodate disabilities during an overseas study abroad program in Australia.<sup>170</sup> The student had become paraplegic following an automobile accident that occurred while she was enrolled in college.<sup>171</sup> While on campus, the college had made accommodations for her, including installing ramps in her dormitory building and changing the biology lab where she worked to be paraplegic accessible.<sup>172</sup>

The *Bird* case is perhaps the most notable study abroad case illustrating

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167. *Id.* at 561–62 (“These four reimbursement components are as follows: (1) reimbursement of any ransom paid; (2) reimbursement for expenses related to securing the release of a kidnap victim or resolution of extortion threat; (3) reimbursement of expenses relating to securing the release of a detained or hijacked victim; and (4) reimbursement of money lost when being delivered as ransom. The fifth, non-reimbursement component of a K & R policy is access to security consultants for preventative measures as well as access to individuals experienced in hostage negotiation, risk management and crisis response in the event of an abduction.”) *See also* Meadow Clendenin, Comment, “No Concessions” with No Teeth: How Kidnap and Ransom Insurers and Insureds are Undermining U.S. Counterterrorism Policy, 56 EMORY L.J. 741, 751–52 (2006) (discussing various policy coverage).

168. *See* Martin Van Der Werf, *A Wide World of Risk*, CHRON. OF HIGHER EDUC. (Mar. 30, 2007), <http://chronicle.com/article/A-Wide-World-of-Risk/28323>.

169. *See* *Bird v. Lewis & Clark Coll.*, 303 F.3d 1015 (9th Cir. 2002).

170. *Id.* at 1017.

171. *Id.*

172. *Id.*

potential liability under both the Rehabilitation Act as well as the Americans with Disabilities Act. Pursuant to 29 U.S.C. § 794(a), the Rehabilitation Act prohibits disability discrimination by entities receiving federal funds.<sup>173</sup> The Rehabilitation Act states that no person with a disability “shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination” by any entity which receives federal funds.<sup>174</sup> Similarly, Title III of the Americans with Disabilities Act prohibits disability discrimination in public accommodations and requires “reasonable modifications” to policies and practices to accommodate those with disabilities.<sup>175</sup>

The student enrolled in her college’s spring overseas program and was apparently told by the director of the overseas program that the program would be able to accommodate her disability.<sup>176</sup> The underlying facts of the case indicated that the college made at least some efforts to accommodate her disability by hiring two students enrolled in the program to be helpers, provided the student with alternative transportation, and provided a special shower head and sleeping cot according to her requirements.<sup>177</sup> While the student was able to take part in a number of outdoor activities,<sup>178</sup> she was unable to participate in all activities.<sup>179</sup> In what appears to be a response to being unable to participate in all of the activities, the student filed a disability discrimination suit against the college.<sup>180</sup> At the trial court level, a jury in Oregon found for the college on the plaintiff’s Rehabilitation Act and Americans with Disabilities Act claims, but for the plaintiff on a breach of fiduciary duty claim.<sup>181</sup>

Examining the plaintiff’s Rehabilitation Act and Americans with Disabilities Act claims, on appeal the United States Court of Appeals for the Ninth Circuit held that the college met its duty to reasonably

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173. 29 U.S.C. § 794(a) (2014).

174. *Id.*

175. 42 U.S.C. § 12182(a) (2014). The statute states: “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” *Id.*

176. *See* *Bird v. Lewis & Clark Coll.*, 303 F.3d 1015, 1017 (9th Cir. 2002).

177. *Id.* at 1018.

178. *Id.* at 1018–1019 (“[The plaintiff] otherwise participated in a number of class activities. She toured the Sydney Harbor, visited an archeological site near the Harbor, and was able to access the classrooms at the University of Sydney. [The plaintiff] traveled to an aboriginal community at Jervis Bay, and went on excursions at Heron Island, Stradbroke Island, and Carnarvon Gorge National Park.”).

179. *Id.* at 1017 (“Not every aspect of the program conformed to her requirements. At some 22 locations, [the plaintiff] did not have full wheel-chair access.”).

180. *Id.* at 1019.

181. *Bird*, 303 F.3d at 1019.

accommodate the plaintiff and it “did not necessarily fail to make reasonable modifications simply because some aspects of the program did not conform to [the plaintiff’s] expectations.”<sup>182</sup> However, the Ninth Circuit Court of Appeals upheld the district court’s finding that a “special relationship” existed between the plaintiff and the college and thus the jury could find for the plaintiff on a breach of fiduciary duty claim.<sup>183</sup> The Ninth Circuit focused on the fact that apparently on a number of occasions the college assured the plaintiff accommodations for the disability would be made, particularly for most of the outdoor trips.<sup>184</sup>

The major implication of the *Bird* case is that university or college study abroad programs may be held liable on breach of fiduciary duty claims by students, and these claims may not only necessarily arise out of representations concerning accommodations during a program. Take the hypothetical situation of a faculty member who has the responsibility to administer a college or university study abroad program and makes specific assurances or representations to a participant as to general program safety abroad, and the participant suffers an injury abroad. Is there a breach of a fiduciary duty if that student participant had taken that faculty member in one or two prior classes, and the faculty member was a general mentor for the student? As one commentator has noted, despite general rejection of the *in loco parentis* doctrine in many states, courts are trending toward finding fiduciary relationships between college and university faculty and students<sup>185</sup> in cases where the elements of a fiduciary relationship have been met.<sup>186</sup> Depending upon the circumstances of each individual case involving an injury of a participant in a college or university study abroad

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182. *Id.* at 1021.

183. *Id.* at 1023–1024.

184. *Id.* at 1023.

185. See Kent Weeks & Rich Haglund, *Fiduciary Duties of College and University Faculty and Administrators*, 29 J.C. & U.L. 153, 158 (2002) (“In the last five years, courts have begun to find more legitimacy in fiduciary duty claims against universities and colleges. With more fact-specific claims, student plaintiffs are becoming more successful at establishing the elements necessary to show the existence of these relationships. There are numerous cases in which courts reject the notion of fiduciary duty. But in these cases, plaintiffs lost because they were not able to prove the necessary elements of a fiduciary duty (such as the creation of a special trust relationship), or because the defendant university or college affirmatively proved the absence of the necessary elements.”).

186. *Id.* at 154–55 (“Certain basic elements are necessary to establish a fiduciary relationship: (1) as between the parties, one must be subservient to the dominant mind and will of the other as a result of age, state of health, illiteracy, mental disability, or ignorance; (2) things of value such as land, monies, a business, or other things of value which are the property of the subservient person must be possessed or managed by the dominant party; (3) there must be a surrender of independence by the subservient party to the dominant party; (4) there must be an automatic or habitual manipulation of the actions of the subservient party by the dominant party; and (5) there must be a showing that the subservient party places a trust and confidence in the dominant party.”).

program, breach of fiduciary duty claims may be viable. Even if a court does not find a fiduciary relationship in such a situation, a college or university study abroad program might still be found liable under a simple breach of contract claim.

### B. The Response to Risks

All of the foregoing risks have brought attention to the quality and safety in study abroad programs. In 2000, a congressional committee held a hearing on safety and risk in foreign study abroad programs. The study abroad industry has also formulated industry standards and best practices for college/university study abroad programs. Finally, many colleges and universities have increased insurance coverage for study abroad programs and have implemented other risk management techniques to minimize liability risk.

#### 1. October 4, 2000 Hearing on Safety in Study Abroad Programs

Responding to news reports of accidents and safety issues in study abroad programs, Congressman Peter Hoekstra called a hearing on October 4, 2000 before the Subcommittee on Oversight and Investigations of the United States House of Representatives Committee on Education and the Workforce with a focus on the topic of safety in study abroad programs. The Subcommittee heard testimony from a diverse group of individuals, which included Mr. John Amato, an attorney whose daughter was one of the participants killed in the tragic 1996 Semester at Sea incident in India; Mr. Peter McPherson, the President of Michigan State University; and Dr. David Larsen, the Director of the Center for Education Abroad of Beaver College, among others.<sup>187</sup>

Mr. Amato's testimony covered not only the facts of his daughter's death in the 1996 Semester at Sea program, but also the response of the Semester at Sea Program and the university that sponsored the program.<sup>188</sup> Mr. Amato contended that the "university did not have in place a system ensuring that all critical life safety issues were addressed by real safety experts" and remarked that "study-abroad programs suffer a problem of systemic proportions within an industry where responsibility for life safety has been treated as a secondary rather than the most important,

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187. See *Study Abroad Programs: Hearing on Safety in Study Abroad Programs Before the Subcomm. on Oversight and Investigations of the H. Comm. on Education and the Workplace*, 106th Cong. (Oct. 4, 2000).

188. See Amato, *supra* note 1, at 6.

fundamental issue underlying the entire study-abroad system.”<sup>189</sup> Mr. Amato also called for Congress to enact a uniform standard of liability enforceable in federal court to apply in cases of study abroad liability and for additional safety regulations.<sup>190</sup>

In contrast to Mr. Amato’s critique of study abroad programs, Mr. McPherson of Michigan State University testified that in the prior five years Michigan State University had approximately 7,800 students study abroad and none incurred serious injuries or accidents.<sup>191</sup> He opined that he believed colleges and universities were generally following emerging national voluntary community standards with regards to study abroad programs.<sup>192</sup> Mr. Larsen not only testified that he believed the discussion over safety issues in study abroad programs should continue, but he also expressed the belief that education concerning safety issues was of more importance than the passage of specific legislation.<sup>193</sup>

Since the hearing in 2000, Congress has seemingly adopted Dr. Larsen’s view as to specific legislation and Congress has not passed any specific legislation implementing additional federal regulations concerning safety in study abroad programs or implementing any federal standard of liability. In fact, Congressman Hoekstra, who called the hearing in 2000, expressed a concern in his opening remarks “that there may be a sizable gap between the best and the worst run study abroad programs.”<sup>194</sup> Despite these concerns, Congressman Hoekstra has also noted the implementation of a federal standard of liability would cripple overseas programs.<sup>195</sup>

## 2. Current Industry Standards

The study abroad industry has also made efforts to respond to the risks posed in overseas study abroad programs. In November 2002, NAFSA: Association of International Educators published a report entitled

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189. *Id.* at 54.

190. *Id.* at 56.

191. *See Study Abroad Programs: Hearing on Safety in Study Abroad Programs Before the Subcomm. on Oversight and Investigations of the H. Comm. on Education and the Workplace*, 106th Cong. (Oct. 4, 2000) (statement of Peter McPherson) [hereinafter McPherson].

192. *Id.* at 10.

193. *See Safety in Study Abroad Programs: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Education and the Workplace*, 106th Cong. 11–14 (Oct. 4, 2000) (statement of David Larsen).

194. *See Safety in Study Abroad Programs: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Education and the Workplace*, 106th Cong. 2–3 (Oct. 4, 2000) (statement of Rep. Peter Hoekstra).

195. *See* Mary Beth Marklein, *Students studying abroad face dangers with little oversight*, USA TODAY (May 28, 2009), [http://usatoday30.usatoday.com/news/education/2009-05-27-study-abroad-main\\_N.htm](http://usatoday30.usatoday.com/news/education/2009-05-27-study-abroad-main_N.htm).



“Responsible Study Abroad: Good Practices for Health and Safety.”<sup>196</sup> The report, drafted by the Interorganizational Task Force on Safety & Responsibility in Study Abroad (comprised of representatives from study abroad providers and professional organizations), outlined a number of “aspirational” guidelines colleges, universities and study abroad providers can implement to better ensure the health and safety of participants in programs.<sup>197</sup>

One of the report’s key recommendations included not only disclosing adequate health and safety information for potential participants in order to make informed decisions on overseas programs, but also for colleges, universities and program sponsors to conduct orientation sessions for participants to discuss and disclose potential risks with regards to “safety, health, legal, environmental, political, cultural and religious conditions” in the country(ies) where the participants will study abroad.<sup>198</sup> In addition, the report called upon colleges, universities and program sponsors to properly investigate and hire reputable program vendors and contractors overseas, conduct periodic audits on all overseas study abroad programs in the areas of health and safety, and also to develop and maintain crisis management and response plans in the event emergency situations arise.<sup>199</sup> Finally, the report advised that all participants in overseas programs be insured, including being covered by health and travel accident insurance.<sup>200</sup> To date the standards are only voluntary and aspirational, and are not in any way legally binding to any overseas study abroad programs.

### 3. Insurance and Other Risk Management Techniques

One common risk management technique many colleges, universities and sponsors of overseas study abroad programs utilize is requiring participants to sign waiver and release agreements in which a participant acknowledges they comprehend and understand the risks involved.<sup>201</sup> Despite their utilization, waivers and releases of tort liability are typically viewed with scrutiny by the courts. As two commentators note, if a release fails to be clear and unequivocal, attempts to release gross/willful

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196. See *Responsible Study Abroad: Good Practices for Health and Safety*, NAFSA (Nov. 2002), available at [http://www.nafsa.org/uploadedfiles/responsible\\_study\\_abroad.pdf](http://www.nafsa.org/uploadedfiles/responsible_study_abroad.pdf) [hereinafter NAFSA I].

197. *Id.*

198. *Id.*

199. *Id.* See also Long, *supra* note 27 (contending that educational institutions should always “address the immediate needs of program participants” in disaster situations and discussing specific items that educational institutions should complete to minimize risk).

200. *Id.* See also NAFSA I, *supra* note 196.

201. See Hoye & Rhodes I, *supra* note 20, at 158 (discussing the utilization of waivers as a risk management tool for a college or university).

negligence or intentional conduct, results from a vast disparity in bargaining power, or adversely affects the public interest, then courts tend to refuse to enforce the agreement.<sup>202</sup>

In the specific context of releases in study abroad agreements, the *Fay v. Thiel College*<sup>203</sup> case illustrates the scrutiny courts place on such contracts. In the *Fay* case, the student participant took part in a study abroad trip to Peru.<sup>204</sup> During the trip, the student reportedly fell ill and a Peruvian doctor allegedly unnecessarily removed her appendix in an operation.<sup>205</sup> After the appendectomy, the student also was allegedly sexually assaulted at the Peruvian medical clinic where the operation took place by the doctor and an anesthesiologist.<sup>206</sup> The plaintiff filed suit against the college following the alleged incidents.

The college filed for summary judgment, contending a waiver released any claims against it relating to the study abroad trip.<sup>207</sup> The waiver stated the following language:

As a condition of my participation in the study or project, I understand and agree I am hereby waiving any and all claims arising out of or in connection with my travel to and from and/or my participation in this project or study that I, my family, my heirs or my assigns may otherwise have against Thiel College and/or its personnel.<sup>208</sup>

Examining Pennsylvania law, a Pennsylvania trial court noted that one of the requirements of upholding the validity of a waiver is that both of the parties have bargaining authority.<sup>209</sup> In declining to uphold the validity of the waiver, the trial court noted that the plaintiff had no power to alter the terms of the form.<sup>210</sup> Furthermore, similar to the *Bird* case, the court also

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202. See Mary Ann Connell & Frederick G. Savage, *Releases: Is There Still a Place for their Use by Colleges and Universities?*, 29 J.C. & U.L. 579, 580–581 (2003) (“When a release is used in conjunction with an activity that is of great importance to the public, that cannot be obtained elsewhere and that involves a significant disparity in the bargaining ability of the parties, courts will seldom enforce the release. Using a number of legal theories to reach this result, courts will not enforce a release if the agreement: (A) affects the public interest; (B) results from a significant disparity of bargaining power; (C) seeks to avoid liability for willful or grossly negligent acts or intentional torts; or (D) expresses the exculpatory intent in ambiguous and inconspicuous language.”).

203. *Fay v. Thiel Coll.*, 55 Pa. D. & C. 4th 353 (Pa. Ct. C.P. Dec. 31, 2001).

204. *Id.* at 355.

205. *Id.* at 356.

206. *Id.*

207. *Id.* at 357.

208. *Fay*, 55 Pa. D. & C. 4th, at 357–58.

209. *Id.* at 358.

210. *Id.* at 360–61 (“The terms of the waiver of liability form were not bargained for by plaintiff and, in fact, plaintiff had no choice in the terms and provisions. Plaintiff

found a “special duty” of care existed between the college and the student.<sup>211</sup> Thus, while a waiver or release might be one step to take for a college or university to exercise risk management covering study abroad program, it is not always that effective.

Other steps may be more effective. A number of colleges, universities and overseas program sponsors have taken a proactive approach in attempting to reduce risk by implementing orientation requirements for participants.<sup>212</sup> These orientation requirements can include discussion of potential risks in the programs and also to prepare students for the adjustment in cultural norms overseas.<sup>213</sup> Orientations are not only completed now through mandatory meetings; with the growth of technology a number of colleges and universities offer online orientation videos and some have mandatory Prezis on course management systems such as Blackboard.<sup>214</sup> College and universities can also require students to sign college or university codes of conduct prior to overseas travel to better regulate risky behavior overseas that may be the result of a participant’s own actions.<sup>215</sup> All of these requirements can be continuously monitored and reviewed by college and university task forces and committees.<sup>216</sup>

Some colleges and universities require individuals to carry health insurance while studying abroad.<sup>217</sup> For example, in his congressional testimony in 2000, President Peter McPherson of Michigan State University testified that every student at Michigan State University is required to obtain medical insurance before studying abroad and that MEDEVAC facilities are made available to students in countries where

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simply executed the waiver of liability form, which she was powerless to alter, because she was told that she had to sign that form in order to go on the study abroad trip to Peru. Because rejecting the transaction entirely was plaintiff’s only option other than accepting the contract with the exculpatory clause, this court finds that the subject waiver of liability form is a contract of adhesion.”).

211. *Id.* at 363 (“After carefully reviewing all of the evidence of record, this court concludes as a matter of law that [the college] did owe plaintiff a special duty of care as a result of the special relationship that arose between [the college] and plaintiff pursuant to the consent form that she was required to execute prior to participating in the [college]-sponsored trip to Peru. Pursuant to the consent form, and in the event that plaintiff became sick or injured, the faculty supervisors had a duty to “secure whatever treatment is deemed necessary, including the administration of an anesthetic and surgery.”).

212. *See* Van Der Werf, *supra* note 168.

213. *See* NAFSA I, *supra* note 196.

214. *See Pre-Departure Requirements*, NORTHWESTERN UNIV. STUDY ABROAD, <http://www.northwestern.edu/studyabroad/outbound-students/pre-departure-requirements/> (last visited Jan. 25, 2015).

215. *See* NAFSA I, *supra* note 196.

216. *See* McPherson, *supra* note 191.

217. *See* Hoye I, *supra* note 20; Long, *supra* note 27 (discussing various types of insurance coverage as a risk management tool for educational institutions).

traditional medical care is difficult to obtain.<sup>218</sup> As noted earlier, kidnapping-and-extortion insurance coverage is also becoming more popular for universities and colleges to obtain for all participants as well.<sup>219</sup> Also, some colleges and universities have gone even further and have obtained special insurance coverage for emergency evacuations, which may apply in the event of calamitous natural disasters, political instability, or following terrorist attacks or the outbreak of political violence and/or armed conflict.<sup>220</sup>

An increasing number of colleges and universities are also hiring full-time health and safety analysts or international risk managers who specialize specifically in safety and compliance issues for international programs.<sup>221</sup> In 2007, three universities had such administrative positions; a 2013 *Inside Higher Education* article interviewed an expert who noted there may be 100 such positions throughout the United States.<sup>222</sup> This same article noted that at many smaller colleges and universities someone on staff or a group of staff members may carry responsibility for emergency response incidents overseas, such as Director or Assistant Director in a study abroad office.<sup>223</sup>

Finally, the stated goal of many policymakers and education professionals to promote overseas study in developing countries lies in tension with the safety risks some of these nations may present. The United States Department of State issues travel alerts to notify travelers of “short-term” events in specific countries, such as health outbreaks or the threat of political strikes or terrorist attacks.<sup>224</sup> The State Department also issues travel warnings in cases when the department wants an individual to consider “very carefully” whether to even proceed with travel due to the

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218. See McPherson, *supra* note 191, at 10.

219. See Van Der Werf, *supra* note 168.

220. *Id.*

221. See Elizabeth Redden, *Increasing number of universities are creating international health, safety and security-related positions*, *INSIDE HIGHER ED* (July 24, 2013), <https://www.insidehighered.com/news/2013/07/24/increasing-number-universities-are-creating-international-health-safety-and-security>.

222. *Id.*

223. *Id.*

224. See *Alerts and Warnings*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, <http://travel.state.gov/content/passports/english/alertswarnings.html> (last visited Jan 25, 2015).

The State Department describes a “Travel Alert” as follows:

We issue a Travel Alert for short-term events we think you should know about when planning travel to a country. Examples of reasons for issuing a Travel Alert might include an election season that is bound to have many strikes, demonstrations, or disturbances; a health alert like an outbreak of H1N1; or evidence of an elevated risk of terrorist attacks. When these short-term events are over, we cancel the Travel Alert.

possibility of an “unstable government, civil war, ongoing intense crime or violence, or frequent terrorist attacks,” in essence giving official notice to all travelers of significant potential dangers in a nation.<sup>225</sup> A number of colleges, universities and other program sponsors monitor these alerts and warnings, and some colleges and universities do not sponsor or allow participation in nations that have received a travel warning from the State Department.<sup>226</sup> A growing number of colleges and universities do not completely bar student participation in programs in countries which are under a travel warning today, but rather typically require a “travel permission” to be received from the college or university risk assessment committee following a review of all the risk issues before proceeding to study.<sup>227</sup>

Despite all of these risk management efforts, the state of study abroad liability remains very nebulous, depending upon jurisdiction, with no firm national standards in place.

#### IV. POSSIBLE FEDERAL REMEDIES FOR STUDY ABROAD LIABILITY

The current landscape of liability of a sponsor or organizer of a study abroad program varies from jurisdiction to jurisdiction. Some jurisdictions may view exculpatory agreements/waivers with more scrutiny than other jurisdictions. In some states, sovereign immunity statutes may operate to immunize the discretionary functions of a public college or university, but such statutes do not apply to private colleges or universities or other entities. With a lack of reported cases on the subject of study abroad liability, varied liability outcomes may be a future norm. Many of the reported cases are decided largely on state law claims, including negligence.

The issue of state versus federal regulation is a contentious one in a number of legal areas. The issue of immigration to the United States is an

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225. *Id.*

The State Department describes a “Travel Warning” as follows:

We issue a Travel Warning when we want you to consider very carefully whether you should go to a country at all. Examples of reasons for issuing a Travel Warning might include unstable government, civil war, ongoing intense crime or violence, or frequent terrorist attacks. We want you to know the risks of traveling to these places and to strongly consider not going to them at all. Travel Warnings remain in place until the situation changes; some have been in effect for years.

226. See Adrian Beaulieu, *Sample Institutional Practices for Using State Department Travel Warnings*, NAFSA (Oct. 20, 2006) (on file with author).

227. See NAFSA Health and Safety in Education Abroad Subcommittee, *Travel Warning Policy Survey Results*, NAFSA (Spring 2011), available at [https://www.nafsa.org/uploadedFiles/NAFSA\\_Home/Resource\\_Library\\_Assets/Networks/AREA1/Travel%20Warning%20Survey%20Report.pdf](https://www.nafsa.org/uploadedFiles/NAFSA_Home/Resource_Library_Assets/Networks/AREA1/Travel%20Warning%20Survey%20Report.pdf).

issue that certainly touches on international concerns.<sup>228</sup> There is much debate over the proper role of federal regulation as opposed to state regulation,<sup>229</sup> and the recent 2012 decision of the United States Supreme Court in *Arizona v. United States* on the validity of Arizona's S.B. 1070<sup>230</sup> has left open questions of preemption of federal law over state law in the immigration context.<sup>231</sup> Outside of immigration law and policy, the area of foreign affairs in the United States has been held by courts in the United States to be largely an area of federal concern.<sup>232</sup>

The issue of study abroad liability arguably touches upon international affairs and advocates of study abroad programs have cited the diplomatic, cultural, social and foreign policy benefits of expanding opportunities for American students to study abroad. At the federal level, policymakers have various options of addressing liability issues of study abroad programs. Policymakers can explore the creation of oversight at the federal level for study abroad programs, examine the adoption of a national, federal standard on study abroad liability, or potentially create a federal cause of action in cases of wrongful death by a participant in a study abroad program.

#### A. Proposal – Federal Standard for Study Abroad Liability

In an effort to resolve the murkiness in case law at the state level concerning study abroad liability, one possible solution is for legislators at the federal level to create a federal cause of action in cases where an educational institution or a nongovernmental institution commits negligence that proximately causes the injury of a participant enrolled in a study abroad program overseas. Mr. John Amato, who lost his daughter in the 1996 Semester at Sea incident, testified at the 2000 congressional hearing on safety in study abroad programs and invited lawmakers to look

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228. See Ernesto Hernández-Lopez, *Sovereignty Migrates in U.S. and Mexican Law: Transnational Influences in Plenary Power and Non-Intervention*, 40 VAN. J. TRANSNAT'L L. 1345, 1348 (2007) (stating that “contemporary developments in the norm of non-intervention in Mexican foreign relations law and other developments in the plenary power doctrine of U.S. immigration law suggest that states may apply sovereignty-based legal doctrines regarding migration in less absolute and traditional manners. . .”).

229. See Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557 (2008).

230. See *Arizona v. United States*, 132 S. Ct. 2492 (2012).

231. See, e.g., Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074 (2013) (generally discussing the issues concerning state and local regulation of immigration).

232. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 363 (2000) (striking down as unconstitutional the Massachusetts Burma Law, “which restricted the ability of Massachusetts and its agencies to purchase goods or services from companies that did business with Burma (Myanmar).”).

at enacting a federal standard of liability to hold colleges, universities and overseas study abroad programs accountable for injuries incurred by participants caused by the negligence of a college, university or overseas study abroad program sponsor.<sup>233</sup> In his testimony, Mr. Amato noted that federal standards are already in existence “to protect shareholders, seamen, [and] railroad workers.”<sup>234</sup>

One federal law that imposes a federal standard of liability is FELA.<sup>235</sup> FELA provides a federal remedy for railroad workers who are injured in the course and scope of their employment for physical injuries incurred due to the negligence of their employer.<sup>236</sup> In the late eighteenth century, thousands of railroad workers suffered work-related injuries while working for railroads and in a number of cases common-law rules such as the fellow-servant doctrine<sup>237</sup> barred their claims against employers.<sup>238</sup> Congress passed FELA with the purpose of promoting safety for railroad workers and to provide those injured and their family members’ recovery for physical injuries.<sup>239</sup> One noted commentator, Professor Jerry Phillips, has contended that fault-based FELA provides “a real and present safety incentive” in a hazardous railroad industry.<sup>240</sup>

It can be argued that a federal standard in study abroad liability cases may encourage greater safety standards to be implemented by colleges, universities and sponsors of study abroad programs.<sup>241</sup> In addition, such legislation would be consistent with federal involvement in other policy areas that implicate international affairs, such as immigration.<sup>242</sup>

A proposed federal statute on study abroad liability may look something like this:

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233. See Amato, *supra* note 1.

234. *Id.*

235. See Federal Employers Liability Act, *supra* note 22.

236. See *Reidelbach v. Burlington N. & Santa Fe Ry. Co.*, 60 P.3d 418, 421 (Mont. 2002).

237. See Thomas C. Galligan, Jr., *The Dreadful Remnants of The Osceola’s Fourth Point*, 34 RUTGERS L.J. 729, 732 (2003) (“Under the common law fellow servant doctrine, a master was *not* vicariously liable to a plaintiff servant if the plaintiff servant’s injuries had been caused by another servant or employee.”).

238. See *Rogers v. Consol. Rail Corp.*, 948 F.2d 858, 861 (2nd Cir. 1991).

239. See *Reidelbach*, 60 P.3d at 423 (“As a consequence of the provisions of the FELA, injured workers, or the families of deceased workers, could obtain compensatory relief for the worker’s injury or death, and the railroads were encouraged to provide their employees with a safe working environment as a means of avoiding liability.”).

240. See Jerry J. Phillips, *An Evaluation of the Federal Employers’ Liability Act*, 25 SAN DIEGO L. REV. 49, 52–54 (1988).

241. See Amato, *supra* note 1 (contending a federal standard of liability can serve to improve safety in study abroad programs).

242. *Id.* (stating that “life safety in study-abroad programs is a federal issue since participants in these programs are drawn from universities all over the nation to travel all over the world.”).

When the physical injury of an individual enrolled in a study abroad program is caused by a wrongful act, neglect, or default by a public educational institution and/or its agents or representatives of a private institution and/or its agents and representatives, the individual injured may bring a civil action in tort in federal district court against the entity(ies) or individual(s) responsible.

Such legislation would appear to face an uphill climb in Congress today. In a 2009 article, Congressman Peter Hoekstra, who called for the 2000 congressional hearings on safety in study abroad programs, was reported as stating that such legislation would “kill overseas programs.”<sup>243</sup> No legislation has been introduced in recent Congresses to implement such a standard.

In the event a federal standard is implemented, a federal cause of action for study abroad liability would likely raise preemption questions. Such issues may arise on supplemental claims. In the case of FELA, the text of the statute does not contain an express preemption clause.<sup>244</sup> A proposed statute on study abroad liability could be written in such a manner to expressly preempt state law claims. But even in the event express preemption does not apply, implied preemption could occur with a federal study abroad liability statute if it were interpreted to imply federal “occupation in the field.”<sup>245</sup> Finally, conflict preemption could occur if a federal study abroad liability statute conflicted with state law and either creates an impossibility to comply with both federal and state law or if state laws block the purposes and objectives of Congress.<sup>246</sup>

A case that could provide some guidance for preemption issues in the federal study abroad context is the case of *Reidelbach v. Burlington Northern and Santa Fe Railway Co.*, a FELA case decided by the Montana Supreme Court in 2002.<sup>247</sup> In *Reidelbach*, an injured plaintiff brought forth not only a FELA claim, but separate state law claims of “unfair, dilatory and fraudulent claims practices” against the defendant employer.<sup>248</sup> In holding that the plaintiff’s claims concerning claims handling were not preempted by FELA, the Montana Supreme Court stated that the duties of the defendant railroad to provide a safe working environment under FELA as well as engage in fair claims handling practices after an employee is

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243. See Marklein, *supra* note 195.

244. See *Reidelbach v. Burlington N. & Santa Fe Ry. Co.*, 60 P.3d 418, 424 (Mont. 2002).

245. *Id.* at 424–25.

246. *Id.* at 425.

247. See generally *id.*

248. *Id.* at 421.



injured “are not mutually exclusive.”<sup>249</sup> Thus, ancillary claims associated with a federal liability statute may not necessarily be preempted.

Another potential issue that may arise in the event of a national standard of liability for study abroad cases is the application of the collateral source rule.<sup>250</sup> The collateral source rule, present in many jurisdictions, bars a defendant from mitigating a plaintiff’s damages award at trial by introducing evidence of a plaintiff’s receipt of benefits from collateral sources and from obtaining a reduction of a verdict by collateral source evidence.<sup>251</sup> For example, a participant in a study abroad program may suffer an injury overseas allegedly caused by the negligence of the overseas program sponsor. If the participant is treated overseas and receives payments from his or her health insurer, such evidence in many jurisdictions may not be admissible in the event that a case against the overseas program sponsor goes to trial.

One other possibly related solution policymakers may consider is a proposal of establishing an injury compensation claims fund at the federal level to apply in study abroad liability cases. Such a claims fund could be modeled after the claims procedures implemented in several states covering tort claims against a state government. In several states, instead of directly suing the state or state agency in a trial court, plaintiffs with claims against a state or its agencies must file a claim with a claims court or a claims commission.<sup>252</sup> All of these courts vary in structure but share the characteristic that an administrative entity resolves tort claims.<sup>253</sup>

In the case of study abroad liability, a claims fund could be created at the federal government level and be housed within the United States

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249. *Reidelbach*, 60 P.3d at 430 (“Compliance with the state laws upon which [the plaintiff] bases his state claims and compliance with the FELA are not mutually exclusive. The railroad can easily satisfy both its duty and obligation to provide a safe working environment for its employees under the FELA, and its state-imposed obligation to engage in fair, good faith claims practices once an employee has been injured. In fact, in a perfect world, the manner in which an individual railroad employer handles the claim of an injured worker would theoretically be uniform – every such claim would be handled honestly, promptly and in good faith.”).

250. The authors would like to thank Professor Will Mawer, Professor at Southeast Oklahoma State University, for encouraging the authors to include a discussion of the collateral source rule in this article.

251. Jamie L. Wershba, *Tort Reform in America: Abrogating the Collateral Source Rule Across the States*, 75 DEF. COUNSEL J. 346, 348 (2008) (“The rule dictates that a defendant may not introduce evidence of collateral sources in order to mitigate a potential damage award, nor may a plaintiff’s damage award be reduced by benefits collateral to the tort action. Under the collateral source rule, evidence of collateral benefits is inadmissible at trial. Likewise, an award cannot be reduced by financial benefits paid to the plaintiff from third-party sources, such as first-party insurance or unemployment benefits.”).

252. *See* Cole & Marzen, *supra* note 128, at 50–52.

253. *Id.* at 50.

Department of Education. Individuals adjudicating claims in the claims fund could be comprised of senior officials of the Department of Education, senior officials of other federal agencies, and perhaps individuals outside of the federal government who are active in industry. If a claims fund is created, a likely issue will arise with the funding of claims awards. Other than congressional appropriation, such funding may potentially come from assessments levied on colleges and universities who send students to overseas study abroad programs by the department which houses the claims fund. Although assessments may be easier to implement with regard to colleges and universities, they will likely be more difficult to impose upon private overseas program sponsors, who are subject to minimal federal oversight and regulation today.

#### B. Proposal – Federal Cause of Action for Wrongful Death for Study Abroad Liability

An alternative approach legislators at the federal level can take concerning a federal cause of action in study abroad liability cases is not to enact a statute covering all cases of alleged negligence of an educational institutional or a nongovernmental institution, but to enact a statute which covers only cases of wrongful death. A wrongful death statute would likely face the same issues with preemption of state law remedies and the collateral source rule as a proposed general federal negligence standard. A more limited wrongful death remedy may be intended to cover only the most tragic cases that involve an individual's loss of life and not cover other general negligence cases, which may be left to state law to determine as to liability.

One area in which Congress has created a wrongful death remedy is the case of the Death on the High Seas Act ("DOHSA"), which creates a cause of action for a wrongful death that occurs on the high seas.<sup>254</sup> A key part of the rationale behind the passage of DOHSA in 1920<sup>255</sup> was to provide a uniform wrongful death remedy for cases outside of the jurisdiction of individual states.<sup>256</sup> Only pecuniary damages are allowed in DOHSA

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254. The DOHSA "provides a remedy for the wrongful death of any person that occurs on the high seas." Moris Davidovitz, *Aviation Deaths on the Seas: The Flight into Maritime Law*, 10 HASTINGS INT'L & COMP. L. REV. 57, 58 (1986).

255. See James W. Clement, Note, *Breaking Waves: The Ninth Circuit Returns to the Text to Decide DOHSA's Applicability in Helman v. Alcoa Global Fasteners, Inc.*, 36 TUL. MAR. L.J. 339, 340 (2011).

256. See Jad J. Stepp & Michael J. AuBuchon, *Flying Over Troubled Waters: The Collapse of DOHSA's Historic Application to Litigation Arising From High Seas Commercial Airline Accidents*, 65 J. AIR L. & COM. 805, 810 (2000) ("In the years leading up to DOHSA's enactment, the Maritime Law Association and various admiralty scholars had been attempting to pass a bill that would provide for an admiralty right of action for deaths occurring on the high seas. The advantages of such

actions<sup>257</sup> and after the United State Supreme Court's decision in *Offshore Logistics, Inc. v. Tallentire*,<sup>258</sup> DOHSA cases can be filed in either state or federal court.<sup>259</sup>

With these considerations in mind, to provide for the possible recovery of both pecuniary and nonpecuniary damages, a federal wrongful death statute in study abroad liability cases might state:

When the wrongful death of an individual enrolled in a study abroad program is caused by a wrongful act, neglect, or default by a public educational institution and/or its agents or representatives of a private institution and/or its agents or representatives, the personal representative of the decedent may bring a civil action in tort in federal district court against the entity(ies) or individual(s) responsible.”

However, just as in the case of a general negligence federal liability standard in study abroad cases, no legislation has been introduced in Congress to create a federal cause of action in cases of wrongful death.

### C. Proposal – Oversight Entity at Federal Level for Study Abroad Programs

A final approach legislators at the federal level can pursue is to enact legislation requiring colleges, universities, and overseas study abroad program sponsors to provide for greater transparency in their study abroad programs as well as mandate disclosure of certain data and risks. There are currently no federal laws or regulations that directly require colleges, universities, and private study abroad program sponsors to disclose data on prior injuries, accidents, the number of participants who contracted illnesses and general risks to potential participants in study abroad programs.

One organization which is active in calling for greater oversight of the study abroad industry at the state and federal level is the Clear Cause Foundation.<sup>260</sup> The vision of the foundation is not only to ensure every participant in an overseas study abroad program is protected by federal

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a bill, according to these scholars, would be to provide these remedies on the high seas, where such remedies did not exist because the high seas were outside of the territorial limits and jurisdiction of the individual states.”).

257. See Kathryn A. Meyers, Note, *Does a Claim Exist for Decedents' Pre-Death Pain and Suffering in Actions Arising Out of Aviation Disasters Governed by the Warsaw Convention and the Death on the High Seas Act?: The Need for Legislative Reform*, 75 WASH. U. L. Q. 1335, 1343 (1997).

258. 477 U.S. 207 (1986).

259. See generally Barbara A. Clark, *Removability of High Seas Death Claims Filed in State Court After Tallentire*, 12 TUL. MAR. L.J. 317 (1988).

260. See *Mission & Vision*, CLEAR CAUSE FOUND., <http://www.clearcausefoundation.org/#!our-mission-vision/c1w2> (last visited Jan. 30, 2015).

guidelines,<sup>261</sup> but it also provides safety resources for potential participants, participants, and sponsors of study abroad programs.<sup>262</sup>

At the federal level, a number of laws protect consumers that require financial institutions and creditors to make certain disclosures. One of the key laws in this area is the Truth in Lending Act, which requires creditors to disclose in a clear manner<sup>263</sup> the annual percentage rate (“APR”) of a loan.<sup>264</sup> The Consumer Financial Protection Bureau (“CFPB”) now has the authority to regulate a number of consumer financial products,<sup>265</sup> and there is discussion regarding the extent of the CFPB’s authority.<sup>266</sup> For example, the CFPB has taken an increased interest in some of the practices of the private student loan industry.<sup>267</sup> The extent of student loan debt in the United States<sup>268</sup> is now a growing concern among policymakers<sup>269</sup> and academics.<sup>270</sup> The CFPB has already begun investigating practices of the

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261. *Id.*

262. *Id.*

263. *See* 15 U.S.C. § 1637(c)(4)(D)(ii) (2010).

264. *See* Elizabeth Renuart & Diane E. Thompson, *The Truth, The Whole Truth, and Nothing but the Truth: Fulfilling the Promise of Truth in Lending*, 25 YALE J. ON REG. 181, 189–90 (2008) (“TILA disclosures have been remarkably effective in educating consumers to pay attention to the APR as a key measure of the cost of credit. Most consumers report looking for and using TILA’s standardized disclosures when shopping. In credit markets where APRs are disclosed, more competition and lower credit prices result.”).

265. *See* Thomas P. Brown, *Disclosure – An Unappreciated Tool in the CFPB’s Arsenal*, 8 BERKELEY BUS. L.J. 209, 210–11 (2011).

266. *See, e.g.*, Susan Block-Lieb, *Accountability and the Bureau of Consumer Financial Protection*, 7 BROOK. J. CORP. FIN. & COM. L. 25 (2012) (discussing the CFPB’s shared enforcement authority with other state and federal regulatory bodies); *see also* Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321 (2013) (providing a general background of the CFPB and its authority).

267. *See* Alan Zibel, Katy Stech & Annamaria Andriotis, *CFPB Criticizes Student-Loan Lenders for ‘Auto Defaults’*, WALL ST. J. (Apr. 22, 2014), <http://online.wsj.com/news/articles/SB10001424052702304049904579516152092960502> (discussing that the CFPB is investigating the practices of private student loan companies concerning “auto default” clauses in student loan contracts, which require a borrower to pay a loan in full upon the death or bankruptcy of a co-signer).

268. *See* Sharon Epperson, *Debt stress and anxiety: how to get out from under*, CNBC (Apr. 16, 2014), <http://www.cnbc.com/id/101586286> (reporting that the total amount of student loan debt in the United States has surpassed \$1 trillion).

269. *See, e.g.*, Joseph Lawler, *Janet Yellen warns student debt may be holding back housing recovery*, WASH. EXAMINER (May 8, 2014), <http://washingtonexaminer.com/janet-yellen-warns-student-debt-may-be-holding-back-housing-recovery/article/2548237>.

270. *See, e.g.*, Doug Rendleman & Scott Weingart, *Collection of Student Loans: A Critical Examination*, 20 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 215 (2014) (providing a comprehensive overview of the student loan default process); Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 SANTA CLARA L. REV. 329 (2013) (proposing an amendment to the United States Bankruptcy Code to allow students to modify student loans to their fair market value and also

private student loan industry,<sup>271</sup> and with a growing number of student loan defaults,<sup>272</sup> increased regulation of private company practices in the student loan industry might occur in the near future, possibly including the adoption of additional mandates concerning disclosures to potential student borrowers.

One of the hallmarks of contract law is that it posits that individuals and entities are able to freely enter into contracts.<sup>273</sup> As noted above, in dealings with financial institutions, consumers are given the benefit of disclosures mandated by law and regulation as to the financial risks of the contract to be had. Students borrowing money for student loans receive increased protections today, and it is feasible that more protections may be forthcoming through the CFPB. As a policy matter, it can be argued that if a student borrowing money for a student loan receives disclosures as to the loan amount and the interest risk associated with the loan, then a student should also receive the benefit of federal regulation requiring colleges and universities to disclose the number of deaths, injuries and participants who contracted illnesses in study abroad programs.

A major step toward requiring disclosures on study abroad program safety has taken place at the state level in the past year. In 2014, the Minnesota Legislature enacted a sweeping study abroad program disclosure bill into law. The law applies to study abroad programs “offered or approved for credit by a postsecondary institution in which program participants travel outside of the United States in connection with an educational experience.”<sup>274</sup> It covers students who are enrolled at any Minnesota college or university.<sup>275</sup>

The law requires all Minnesota colleges and universities to report information on the deaths of participants in programs as well as “accidents and illnesses that occurred during program participation as a result of

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permit dischargeability of the student loan debt after the adjustment to fair market value); Amanda Harmon Cooley, *Promissory Education: Reforming the Federal Student Loan Counseling Process to Promote Informed Access and to Reduce Student Debt Burdens*, 46 CONN. L. REV. 119 (2013) (proposing revisions to the Higher Education Act to improve credit counseling for students).

271. See Zibel, Stech & Andriotis, *supra* note 267.

272. See Floyd Norris, *The Hefty Yoke of Student Loan Debt*, N.Y. TIMES, Feb. 21, 2014, [http://www.nytimes.com/2014/02/20/business/economy/the-hefty-yoke-of-student-loan-debt.html?\\_r=0](http://www.nytimes.com/2014/02/20/business/economy/the-hefty-yoke-of-student-loan-debt.html?_r=0).

273. See Larry A. DiMatteo, *Penalties as Rational Response to Bargaining Irrationality*, 2006 MICH. ST. L. REV. 883, 885 (2006) (“The common law of contracts rests on two fundamental principles. The first principle, the bargain principle, holds that a contract freely entered into should be strictly enforced. The courts have a negative obligation not to judge the fairness of the terms in such contracts.”).

274. MINN. STAT § 5.41(1)(c) (2014). See also *The Implications of New Legislation in the State of Minnesota*, FORUM ON EDUC. ABROAD (Oct. 15, 2014), available at <http://www.forumea.org/wp-content/uploads/2014/10/Minnesota-Legislation-Oct-13.pdf> [hereinafter Forum on Educ. Abroad].

275. See Forum on Educ. Abroad, *supra* note 274.

program participation and that required hospitalization.”<sup>276</sup> The Minnesota Secretary of State is required to publish information concerning program safety on its web site.<sup>277</sup> The legislation also requires Minnesota colleges and universities to include a link to the Secretary of State’s website in its material provided to potential program participants and also that study abroad program information relating to health and safety is available at the website.<sup>278</sup> Finally, it also mandates that Minnesota colleges and universities report as to whether their study abroad programs comply “with health and safety standards set by the Forum on Education Abroad or a similar study abroad program standard setting agency.”<sup>279</sup>

The Minnesota legislation is the first of its kind at the state level and a major step toward providing consumers access to study abroad program safety information. As a follow-up on the passage of the new Minnesota law, Democratic Congressman Sean Patrick Maloney introduced the Ravi Thackurdeen Safe Students Study Abroad Act in September 2014 to push for increased disclosure requirements under federal law.<sup>280</sup> The legislation would require higher education institutions to include statistical reporting on crimes that occur while a student is participating in a study abroad program, irrespective of whether or not the higher education institution owns the property where the crime(s) occur.<sup>281</sup> It would also require higher

276. MINN. STAT. § 5.41(2)(a) (2014). *See also* Forum on Educ. Abroad, *supra* note 274.

277. MINN. STAT. § 5.41(3) (2014). *See also* Forum on Educ. Abroad, *supra* note 274.

278. MINN. STAT. § 5.41(5) (2014). *See also* Forum on Educ. Abroad, *supra* note 274.

279. MINN. STAT. § 5.41(2)(b) (2014). *See also* Forum on Educ. Abroad, *supra* note 274.

280. *See* Ravi Thackurdeen Safe Students Study Abroad Act, H.R. 5485, 113th Cong. (2014) [hereinafter Ravi Thackurdeen Safe Students Study Abroad Act].

281. *See id.* at § 2(a)(3).

It should be noted that in 2011 the United States Department of Education issued The Handbook for Campus Safety and Security Reporting, which includes requirements for educational institutions to report overseas crimes pursuant to the Clery Act.

It is now generally considered that overseas crimes are reportable under the Clery Act if they occur:

In space that the institution owns or controls overseas or at a distance, which is used to support the institution’s mission and are frequently used by students; On an overseas study trip which includes overnight trips and either:

The same hotel/hostel is used on a regular basis (the institution has a long-term agreement with the hotel or housing company to utilize its space or has a practice of using the same hotel or housing company); or More than one night is spent in a particular hotel/hostel.

Joseph Storch, *The Clery Act and Overseas/Distance Study: New Developments and*

education institutions to complete a biennial review of study abroad programs and to compile statistics in a report on the number of deaths, accidents and illnesses that required hospitalization, sexual assaults, and incidents that resulted in police involvement or a police report of program participants that have occurred in the previous ten years.<sup>282</sup> While the Minnesota legislation required compilation of data on study abroad incidents, not only does the proposed federal legislation require compilation of data, but also, going beyond the Minnesota law, it requires higher education institutions to take affirmative steps in furnishing the data on incidents to study abroad program participants in required pre-trip orientation meetings.<sup>283</sup>

Safety in study abroad programs is also receiving increasing attention from other policymakers. On October 23, 2014 United States Senators Kirsten Gillibrand, Al Franken, and Robert Casey sent a letter to Arne Duncan, the United States Secretary of Education, expressing concerns about safety in study abroad programs.<sup>284</sup> One of the key recommendations of Senators Gillibrand, Franken and Casey was for the Department of Education to develop guidelines to ensure that K-12 and higher education institutions only affiliate with or accept credits from programs that either follow or have implemented more stringent safety guidelines than those programs sponsored by the State Department.<sup>285</sup> These developments make legislation action concerning study abroad safety a possibility in the 114th Congress.

More oversight of study abroad programs at the federal level can take place within the United States Department of State, but a federal agency similar to the CFPB could be created to monitor study abroad programs. Federal oversight of study abroad programs might not only include reporting on statistics and data and making that information available to all members of the public, but may also involve requiring that study abroad programs have certain minimum standards for programs in place. Such standards might include requiring that every participant in a study abroad program be covered by a minimum level of insurance and that colleges, universities and private sponsors have crisis management plans in place to

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*Compliance Guidance*, 10 NACUANOTES 5, 4 (Feb. 29, 2012), available at <http://apps.forumea.org/documents/TheCleryActandOverseasDistanceStudyNewDevelopmentsandComplianceGuidanceNACUA.pdf>.

For a comprehensive discussion of issues arising under the Clery Act, see Bonnie S. Fisher, et al., *Making Campuses Safer for Students: The Clery Act as a Symbolic Legal Reform*, 32 STETSON L. REV. 61 (2002).

282. See Ravi Thackurdeen Safe Students Study Abroad Act, *supra* note 280, at §§ 2(b)(2)(18)(A)(i)(II)(aa)–(dd).

283. See *id.* at §§ 2(b)(2)(18)(B)(i)(I)–(III).

284. Letter from Kirsten Gillibrand, Al Franken & Robert Casey, U.S. Senators, to Arne Duncan, U.S. Secretary of Education (Oct. 23, 2014) (on file with author).

285. *Id.*

respond to emergency situations. To benefit potential participants in programs, the federal entity charged with oversight may develop a rating system to rate colleges, universities and private program sponsors on safety issues on a periodic basis.

With the examples of legislation and regulation at the federal level requiring greater transparency and disclosure in the areas of consumer lending and student loans, as well as the recently introduced Ravi Thackurdeen Safe Students Study Abroad Act, it appears that legislation that would require colleges, universities and overseas study abroad programs to fully disclose statistics as to injuries and potential risks abroad would have the greatest chance of success in the near term compared to legislation concerning the implementation of a federal standard of liability in study abroad cases.

#### CONCLUSION

For many students, studying abroad is a hallmark in the collegiate experience. While studying abroad provides many a valuable experience with benefits that last a lifetime, the experience is not free from risk. Concrete steps can be taken by participants in study abroad programs and the administrators of study abroad programs to provide for a greater chance of a safe experience abroad.

Study abroad legislation likely faces a tough road ahead in this Congress as well as future Congresses, but may be a much more feasible option if further tragedies occur. Study abroad legislation does come with tradeoffs. On the one hand, more stringent requirements may dramatically improve safety precautions. On the other hand, legislation may have an effect of increasing expenses necessary to comply with the rules. The costs of the rules may be passed on to participants in study abroad programs, and such costs might have an effect of making studying abroad a less financially accessible experience.

Overall, the very idea of proposing federal safety legislation in the study abroad area could in itself have a positive effect even if legislation is not enacted. Discussion of potential legislation in the public square may also serve to focus more resources and attention on safety and study abroad programs may self-regulate more in these areas. Awareness of potential risks overall and increased vigilance in study abroad programs will help study abroad programs deliver the experience meant to be delivered – a culturally, socially, and educationally enriching experience for students that lasts a lifetime.





# SEARCHING FOR RACE-NEUTRAL ALTERNATIVES: THE COLLEGE AND UNIVERSITY AMICUS BRIEFS IN *FISHER V. UNIVERSITY OF TEXAS*

BENJAMIN S. BAUM\*

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The Supreme Court’s decision on the constitutionality of affirmative action at the University of Texas has reach well beyond that one university. In *Fisher v. University of Texas*, the affirmative action case before the Supreme Court in 2013, seventy–three outside groups filed amicus briefs in support of the University of Texas, including eight amicus briefs filed by one hundred seventeen undergraduate, four–year colleges and universities.<sup>1</sup> There was good reason for these institutions to express their opinions; the Supreme Court has carefully considered the amicus briefs of colleges and

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1. 133 S. Ct. 2411 (2013).

universities when making decisions about the constitutionality of affirmative action in the past.

In *Grutter v. Bollinger*, the landmark affirmative action case in 2003, both the majority opinion by Justice Sandra Day O'Connor and the dissent by Justice Anthony Kennedy relied on amicus briefs from colleges and universities.<sup>2</sup> O'Connor wondered whether the affirmative action tools at one university may work equally well at other kinds of universities.<sup>3</sup> She questioned, for example, the appellant Barbara Grutter's argument that a race-neutral percentage plan, whereby students in the top decile of their high school class would receive automatic admission to a college or university without any additional consideration of race, could work equally well for an undergraduate institution as for a graduate or professional school.<sup>4</sup> She also was skeptical about how such a program could work for selective institutions with more qualified applicants than places in the class. Percentage plans, she wrote, "would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both."<sup>5</sup> The experiences of other colleges and universities, she envisioned, would help inform affirmative action practices going forward.

Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches. Colleges and universities in other states can and should draw on the most promising aspects of these race-neutral alternatives as they develop.<sup>6</sup>

Kennedy, similarly, cited an amicus brief filed by Amherst College and twenty-seven other colleges and universities as evidence of alternative affirmative action programs that may require more nuanced analysis than the affirmative action program at the University of Michigan Law School.<sup>7</sup> Kennedy noted that Amherst College, unlike the University of Michigan Law School, did not run daily queries for race when admitting its class, nor did it have consistent numbers of black students year-to-year, and this changed Kennedy's perception of the constitutionality of the various programs.<sup>8</sup> And Justice Lewis Powell's opinion in *Regents of the University of California v. Bakke*, the 1978 predecessor to *Grutter*, relied extensively on a description of Harvard University's affirmative action

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2. 539 U.S. 306 (2003).

3. *See id.* at 340.

4. *See id.*

5. *Id.* at 340.

6. *Id.* at 342.

7. *See Grutter*, 539 U.S. at 392 (Kennedy, J., dissenting).

8. *See id.* at 391–92 (Kennedy, J., dissenting).

program as portrayed through its amicus brief.<sup>9</sup>

In *Fisher*, however, Kennedy did not reference any amicus briefs. Writing for the majority, which upheld *Grutter*, Kennedy emphasized the long-standing requirement that colleges and universities employ workable race-neutral means of selecting their classes before resorting to race-conscious methods.<sup>10</sup> But instead of deciding whether the University of Texas had workable race-neutral tools at its disposal, Kennedy remanded the case to the Fifth Circuit Court of Appeals.<sup>11</sup>

Kennedy's lack of reference to the eight college and university amicus briefs is telling. A decision on the constitutionality of affirmative action impacts all of higher education and institutions of varying size, shape, mission, and selectivity. In this article, I argue that Kennedy did not have the information to determine the workability of race-neutral alternatives because the amicus briefs filed by colleges and universities failed to address this question. I examine, first, how Kennedy subtly shifted the emphasis to these race-neutral alternatives in *Fisher* and how he defined race-neutral alternatives for the first time. Second, I show how the college and university amicus briefs did not fully tackle the question of race-neutral alternatives, but then also how the briefs contained clues about these alternatives for the Fifth Circuit to parse on remand. Lastly, I look at the failure of the Fifth Circuit to meaningfully apply the standard described by Kennedy in *Fisher*.

## I. RACE-NEUTRAL ALTERNATIVES IN *GRUTTER* AND *FISHER*

### A. *Grutter*: O'Connor and Kennedy Disagree on Race-Neutral Alternatives

In *Grutter*, the Supreme Court held that colleges and universities may use race-conscious admissions policies in order to reap the educational benefits that flow from a diverse community.<sup>12</sup> The *Grutter* court ruled that the University of Michigan Law School's practice of giving applicants from underrepresented racial and ethnic groups a boost in admissions was constitutional. Because government action based on race is suspect under the Equal Protection Clause, the Court decided that the Law School must meet the exacting standard of strict scrutiny: the Law School must show that (1) it has a compelling interest and that (2) its race-conscious program is narrowly tailored to achieve that interest.<sup>13</sup> On the first point, O'Connor,

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9. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316–17 (1978) (opinion of Powell, J.).

10. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013).

11. *Id.*

12. See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

13. *Id.*

writing for the majority, held that those educational benefits that flow from a diverse class are a compelling interest, deferring to the Law School's judgment about its educational mission.<sup>14</sup> On the second, O'Connor went through a multistep process to determine that the Law School's race-conscious admissions program was narrowly tailored. She held that "[n]arrow tailoring does. . . require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks,"<sup>15</sup> and found that the Law School "sufficiently considered workable race-neutral alternatives" before resorting to a race-conscious program.<sup>16</sup> The Law School's chosen race-conscious program—one that used race as a plus factor in an individualized, holistic process where race is not the determinative factor, and also one that will terminate as soon as practicable—was narrowly tailored.<sup>17</sup>

Kennedy dissented in *Grutter*. Calling the majority's application of strict scrutiny "perfunctory," Kennedy argued that the Law School's race-conscious admissions program failed to satisfy the narrow tailoring prong of strict scrutiny.<sup>18</sup> Kennedy did not believe that the Law School had adequately considered race-neutral alternatives to its race-conscious admissions program, and that O'Connor simply deferred to the Law School's judgment that race-neutral alternatives would be unworkable. "Were the courts to apply a searching standard to race-based admissions schemes, that would force educational institutions to seriously explore race-neutral alternatives. The Court, by contrast, is willing to be satisfied by the Law School's profession of its own good faith."<sup>19</sup> Kennedy would have put the Court to work looking for race-neutral alternatives as opposed to simply trusting that the Law School had adequately considered them.

#### B. *Fisher*: Kennedy Wins, Placing Greater Emphasis on Race-Neutral Alternatives

In *Fisher*, the plaintiff accused the University of Texas of using a race-conscious admissions program that violated the Equal Protection Clause.<sup>20</sup> The University of Texas's admissions program consisted of two parts. First, the University admitted the top ten percent of students in every high school in Texas. Facially race-neutral, the percentage plan was designed to take advantage of racial segregation in Texas high schools by admitting a

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14. *See id.* at 333.

15. *Id.* at 339.

16. *Id.* at 340.

17. *Grutter*, 539 U.S. at 340, 343.

18. *See id.* at 388–89 (Kennedy, J., dissenting).

19. *Id.* at 394.

20. *See Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013).

diverse group of high school seniors at the top of their classes.<sup>21</sup> Second, the University reserved a number of seats in the freshman class for students who were not in the top ten percent of their high school classes, but who, on an individualized, holistic read of the application—a read that included consideration of race—were determined meritorious by the admissions office.<sup>22</sup> The district court granted summary judgment to the University of Texas, concluding its program was consistent with *Grutter*.<sup>23</sup> The Fifth Circuit affirmed.<sup>24</sup>

Kennedy, writing for the Court's majority in *Fisher*, upheld the foundation laid in *Grutter*.<sup>25</sup> He reaffirmed that the standard of review is strict scrutiny, that the educational benefits that flow from a diverse student body are a compelling interest, and that the compelling interest must be narrowly tailored.<sup>26</sup>

But instead of determining whether the University of Texas met the standard, Kennedy criticized the Fifth Circuit for improperly applying the narrow tailoring prong of the strict scrutiny and remanded the case. The Fifth Circuit had deferred to the University of Texas, taking at face value the University's good-faith claim that race-neutral alternatives were unworkable.<sup>27</sup> As Kennedy wrote: "[t]he University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference."<sup>28</sup>

Compare O'Connor's opinion in 2004 to Kennedy's in 2013. O'Connor in *Grutter* stated: "Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks."<sup>29</sup> Kennedy in *Fisher* stated: "The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity."<sup>30</sup>

These statements do not conflict, nor do they exactly align. Kennedy's allows for less ambiguity than O'Connor's. Based on O'Connor's language, the Fifth Circuit in *Fisher* placed the emphasis on the University's good faith, stating:

*Grutter* teaches that so long as a university considers race in a holistic and individualized manner, and not as part of a quota or

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21. *See id.*

22. *Id.*

23. *Fisher v. Univ. of Tex.*, 645 F. Supp. 2d. 587 (W.D. Tex. 2009) [hereinafter *Fisher I*].

24. *Fisher v. Univ. of Tex.*, 631 F.3d 213 (5th Cir. 2011) [hereinafter *Fisher II*].

25. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) [hereinafter *Fisher*].

26. *See id.* at 2413

27. *Fisher II*, 631 F.3d at 213.

28. *Fisher*, 133 S. Ct. at 2420.

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

30. *Fisher*, 133 S. Ct. at 2414.

fixed-point system, courts must afford a measure of deference to the university's good faith determination that certain race-conscious measures are necessary to achieve the educational benefits of diversity, including attaining critical mass in minority enrollment.<sup>31</sup>

O'Connor never mentioned *deference* to a college or university's good faith judgment on the effectiveness of race-neutral alternatives in *Grutter*. The Fifth Circuit made this leap on its own. And in *Fisher*, Kennedy wrote that the Fifth Circuit's interpretation of O'Connor was wrong.<sup>32</sup> It was the same interpretation he attacked in his *Grutter* dissent.

Compare Kennedy in both *Grutter* and *Fisher*. Kennedy stated in *Grutter*: "The Court confuses deference to a university's definition of its educational objective with deference to the implementation of this goal. In the context of university admissions the objective of racial diversity can be accepted based in empirical data known to us, but deference is not to be given with respect to the methods by which it is pursued."<sup>33</sup> In *Fisher*, Kennedy stated: "The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference."<sup>34</sup>

We can see the *Fisher* decision as round two in O'Connor and Kennedy's 2003 disagreement over race-neutral alternatives, but this was an unfair fight: with O'Connor no longer sitting on the Court, Kennedy easily won. In O'Connor's absence, Kennedy could re-shape *Grutter* to incorporate the principles set forth in his dissent. Going forward, Kennedy clearly put the onus on the institution to demonstrate that its programs are, indeed, narrowly tailored to achieve a diverse student body.<sup>35</sup> He left the application of strict scrutiny on the narrow-tailoring prong to some future decision.<sup>36</sup>

### C. Defining "Race Neutral"

An unspoken assumption in *Fisher* was that race-neutral alternatives are a clearly-defined category.<sup>37</sup> They are not. The Supreme Court had not been consistent about its use of the term "race neutral." Sometimes, to be race neutral required the motivating factor behind any policy to be

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31. *Fisher II*, 631 F.3d at 233.

32. *Fisher*, 133 S. Ct. at 2414.

33. *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting).

34. *Fisher*, 133 S. Ct. at 2414.

35. *See id.*

36. *Id.*

37. *Id.*

something other than race.<sup>38</sup> Notably, Justice Ruth Bader Ginsburg dissented in *Fisher* by saying that “only an ostrich could regard the supposedly neutral alternatives as race unconscious.”<sup>39</sup> As Ginsburg noted, the entire reason the University of Texas had a percentage plan is because the admissions office was race conscious.<sup>40</sup> The racial segregation of Texas public schools allowed the University of Texas to use the percentage plan as a proxy for race.

*Fisher* is a turning point in how we understand “race neutral.” In his opinion, Kennedy told colleges and universities that the goal of racial diversity is constitutionally acceptable.<sup>41</sup> In the same breath, he told colleges and universities that the methods used to attain this racial diversity should be race neutral.<sup>42</sup> The Court could not possibly mean that race-neutral alternatives must be blind to race, as Kennedy envisions a schema where these alternatives are being expressly used for the purpose of creating racial diversity, among other kinds of diversity. Race-neutral alternatives are only facially race-neutral; in *Fisher*-speak, race-neutral can still mean motivated by race-consciousness.

Crucially, in using the term “race-neutral,” Kennedy is not pretending that race is absent from the University of Texas’ percentage plan. He is not an “ostrich.” This is not affirmative action by “subterfuge.”<sup>43</sup> Notably, the amicus brief filed by Harvard University in *Grutter* called proxies for race “disingenuous” and not truly race neutral because the motivating factor behind the proxies are racial diversity.<sup>44</sup> My understanding of Kennedy: categorization of applicants by racial groups is extremely problematic under the Equal Protection Clause, and facially race-neutral programs that are racially motivated are somewhat less problematic. As George La Noue

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38. See e.g., Arthur L. Coleman, Scott R. Palmer, & Steven Y. Winnick, *Race-Neutral Policies in Higher Education: From Theory to Action*, COLL. BD. (June 2008), available at [http://professionals.collegeboard.com/profdownload/Race-Neutral\\_Policies\\_in\\_Higher\\_Education.pdf](http://professionals.collegeboard.com/profdownload/Race-Neutral_Policies_in_Higher_Education.pdf) (arguing race-neutral alternatives cannot be motivated by race).

39. See *Fisher*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting).

40. See *id.*

41. *Id.* at 2420.

42. *Id.*

43. See Chapin Cimino, *Class-Based Preferences in Affirmative Action Programs After Miller v. Johnson: A Race-Neutral Option, or Subterfuge?*, 64 U. CHI. L. REV. 1289, 1290–91 (1997) (calling race-neutral alternatives relying on socioeconomic status race-conscious affirmative action by “subterfuge”). See also Richard Thompson Ford, *The Secret Danger in the Supreme Court’s Affirmative Action Ruling*, SLATE (June 27, 2013), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/06/supreme\\_court\\_and\\_affirmative\\_action\\_will\\_only\\_elite\\_wealthy\\_colleges\\_end.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/06/supreme_court_and_affirmative_action_will_only_elite_wealthy_colleges_end.html) (calling race-neutral alternatives “transparent evasions”).

44. See Brief of Harvard University Amicus Curiae Supporting Respondent, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).



and Kenneth Marcus write: “[f]acially race-neutral procedures may have some advantages over racially explicit classifications, even if such procedures are adopted with a race-conscious goal.”<sup>45</sup> For example, explicit racial categories may be particularly disfavored, promote racial stigma, and increase racial hostility.<sup>46</sup> In general, the Supreme Court tells us that facially race-neutral alternatives motivated by race, while still suspect and subject to strict scrutiny, are less suspect than explicitly race-conscious programs that divide applicants by racial groups.<sup>47</sup>

Unfortunately, in *Fisher* the Court gave few examples of these race-neutral alternatives that are motivated by race consciousness. In *Grutter*, O’Connor suggested that (1) percentage plans, like the one used in Texas, and (2) lottery programs are “race neutral,” even though these methods are explicitly motivated by race.<sup>48</sup> O’Connor also used the term “race-neutral” when describing an admissions schema that would “decreas[e] the emphasis for all applicants on undergraduate GPA and LSAT scores.”<sup>49</sup> Not to be boxed in, though, she never fully committed, merely, as she said, “assuming such plans are race-neutral.”<sup>50</sup>

In *Fisher*, Kennedy did not comment on the specific race-neutral practices of which he approved.<sup>51</sup> But the cases he cited are illustrative. In *Parents Involved in Community Schools v. Jefferson County Board of Education*, the Court reprimanded a school district using a race-conscious school assignment system for “fail[ing] to show that they considered methods other than explicit racial classifications to achieve their stated [race-conscious] goals.”<sup>52</sup> Kennedy, concurring, noted that “[s]chool boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and

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45. George La Noue & Kenneth L. Marcus, “*Serious Consideration*” of Race-Neutral Alternatives in Higher Education, 57 CATH. U. L. REV. 991, 1014 (2008).

46. *See id.*; *see also* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 214 (1995) (“distinctions between citizens solely because of their ancestry are by their very nature odious to a free people who institutions are founded upon the doctrine of equality”); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989) (racial classifications promote “notions of racial inferiority and lead to a politics of racial hostility”).

47. *See* La Noue & Marcus, *supra* note 45; *see also* Brian T. Fitzpatrick, *Can Michigan Universities Use Proxies for Race After the Ban on Racial Preferences?*, 13 MICH. J. RACE & L. 277, 288 (2007).

48. *Grutter v. Bollinger*, 539 U.S. 306, 340 (2003).

49. *Id.* (quoting App. to Pet. for Cert. 251a).

50. *Id.* at 340.

51. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013).

52. 551 U.S. 701, 735 (2007).

tracking enrollments, performance, and other statistics by race.”<sup>53</sup> He drew a distinction between facially race-neutral programs with racially-motivated intent and programs that explicitly divide people on the basis of race.<sup>54</sup>

In *City of Richmond v. Croson*, the Court found that the city failed to consider race-neutral means of increasing the number of bids from black contractors.<sup>55</sup> The Court proposed a number of race-neutral alternatives: “[s]implification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect.”<sup>56</sup>

Based on such Supreme Court precedent, some scholars have seen a plethora of potential race-neutral alternatives for admissions. Universities in Michigan, for example, have “identified a number of criteria which would appear to correlate fairly well with African American, Hispanic, and Native American applicants: bilingualism, residency on an Indian reservation or in Detroit, and experience overcoming discrimination.”<sup>57</sup> As one scholar wrote, such proxies for race “will satisfy strict scrutiny rather easily.”<sup>58</sup>

The Court’s definition of “race neutral” in *Fisher* thus has precedent in decisions such as *Parents Involved*<sup>59</sup> and *Croson*<sup>60</sup>, but is a departure from what many have assumed “race-neutral” might mean. Kennedy now has given permission for colleges and universities to look more closely at such proxies.

## II. THE VALUE OF THE *FISHER* AMICUS BRIEFS FROM COLLEGES AND UNIVERSITIES

### A. The College and University Amicus Briefs in *Fisher* Miss Race-Neutral Alternatives

There were eight amicus briefs filed with the Supreme Court in *Fisher* by undergraduate, four-year colleges and universities, with the lead amici

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53. *Id.* at 789 (Kennedy, J., concurring); see also Andrew LeGrand, *Narrowing the Tailoring: How Parents Involved Limits the Use of Race in Higher Education Admissions*, 21 NAT’L BLACK L.J. 53, 65 (2009).

54. *See id.*

55. *See City of Richmond v. Croson*, 488 U.S. 469, 509 (1989).

56. *Id.* at 509–10.

57. Fitzpatrick, *supra* note 47, at 292.

58. *Id.*

59. 551 U.S. 701 (2007).

60. *Croson*, 488 U.S. at 469.

being Appalachian State University, Fordham University, the University of North Carolina, the University of Delaware, California Institute of Technology, Amherst College, Brown University, and the University of California. Only the University of California adequately explained how race-neutral alternatives could be employed in admissions.<sup>61</sup> The briefs left Kennedy in the uncomfortable position of having a large evidentiary record related to the University of Texas (and arguably other large, public colleges and universities like the University of California) but little data on how race-neutral alternatives might work in other settings, especially selective, private colleges and universities with national (and international) applicant pools.<sup>62</sup>

Appalachian State University's brief, joined by thirty-five other institutions, did not attempt to show the workability of race-neutral alternatives.<sup>63</sup> Fordham University's brief, joined by seven other colleges and universities, also failed to make this showing. Instead, Fordham made the grand argument that the First Amendment protects its right as an educational institution to decide the methods of selecting its students.<sup>64</sup> A race-neutral admission plan, such as a percentage plan premised on the segregation of public schools as in Texas, "renders *amici* complicit in the underlying societal inequities from which it arises" and "*amici* could easily conclude that use of such 'race-neutral' plans to achieve diversity conflicts irreconcilably with their educational mission."<sup>65</sup>

The University of North Carolina's brief only considered one race-neutral alternative: a percentage plan.<sup>66</sup> That brief concluded that "mechanical" percentage plans would increase racial diversity by a single percentage point while "simultaneously depress[ing] almost every other indicator of academic quality."<sup>67</sup> Similarly, the University of Delaware's brief, joined by ten other colleges and universities, criticized the "blunt instrument" of percentage plans.<sup>68</sup> And again, California Institute of

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61. See Brief Amicus Curiae of the President and Chancellors of the Univ. of Cal. in Support of Respondents at 22, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (No. 11-345) [hereinafter Brief for Univ. of Cal.].

62. See Briefs filed as Amici Curiae, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013).

63. See Brief for Appalachian State Univ. et al. as Amici Curiae in Support of Respondents, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (No. 11-345).

64. See Brief for Fordham Univ. et al. as Amici Curiae Supporting Respondents at 26, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (No. 11-345).

65. *Id.* at 25.

66. See Brief for the Univ. of N.C. at Chapel Hill as Amici Curiae Supporting Respondents, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (No. 11-345).

67. *Id.* at 34.

68. Brief for Leading Pub. Research Univ. the Univ. of Del. et al. as Amici Curiae in Support of Respondents at 28-29, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013)

Technology's brief, joined by nine other colleges and universities, focused on how percentage plans, using "strictly numerical criteria," are infeasible for selective institutions drawing national student bodies.<sup>69</sup>

The remaining briefs from Amherst College, Brown University, and the University of California also attacked the notion that percentage plans are workable race-neutral alternatives for their institutions. Amherst College's brief, joined by thirty-six other colleges and universities, argued that even if percentage plans could work at large state colleges and universities, "*neither they nor any other alternatives of which we are aware could conceivably work at small, highly selective schools like amici.*"<sup>70</sup> Brown University's brief, joined by thirteen other colleges and universities, included three pages under the title: "Mechanistic, Ostensibly Race-Neutral Policies Are Not Constitutionally Required Alternatives For Achieving Diversity."<sup>71</sup> Brown said that percentage plans would not work for selective, private institutions because the size, selectivity, and national and international applicant pools make such a program impracticable.<sup>72</sup> "Were each Amicus to guarantee admission to just the top student at each of the nation's secondary schools, that would require admitting many more than 20,000 students."<sup>73</sup> The University of California's brief noted that percentage plans in California failed to produce equivalent diversity to what had been achieved with race-conscious measures.<sup>74</sup>

North Carolina, Delaware, the California Institute of Technology, Amherst, Brown, and the University of California all made compelling arguments about why percentage plans are not workable for their institutions by contrasting such a "mechanistic" admissions program with the holistic systems they use right now. As Brown succinctly put their collective argument: "[t]he admissions policies of Amici vary somewhat, but each is firmly committed to individualized, holistic review. . . . Amici do not place dispositive weight on objective numerical measures. . . . in addition to seeking students who are qualified, each institution also looks to compose a student body that is exceptional, complementary, and diverse in

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(No. 11-345).

69. Brief for Cal. Inst. of Tech. et al. as Amici Curiae in Support of Respondents at 22, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (No. 11-345) [hereinafter Brief for Cal. Inst.].

70. Brief for Amherst Coll. et al. as Amici Curiae Supporting Respondents at 21, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (No. 11-345) [hereinafter Brief for Amherst].

71. Brief for Brown Univ. et al. as Amici Curiae in Support of Respondents at 14, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (No. 11-345) [hereinafter Brief for Brown].

72. *See id.* at 15.

73. *Id.* at 15–16.

74. *See* Brief for Univ. of Cal., *supra* note 61, at 22.

many ways.”<sup>75</sup>

But only Amherst, Brown, and the University California took their arguments past the so-called “mechanistic” admission programs. Amherst said that “it is unrealistic to believe that highly selective institutions could retain diversity, while not taking it directly into account, by improving search techniques [for black and Hispanic prospective students], or focusing even more than they now do on low socio-economic rank. . . .”<sup>76</sup> The brief cited a Williams College plan “based solely on socio-economic disadvantage” and a book that made the same point that “class-based preferences cannot be substituted for race-based policies.”<sup>77</sup>

Brown expounded upon its race-neutral programs in greater detail than most, but the conclusion paralleled Amherst.

Amici do extensively consider a wide range of race-neutral factors in seeking to compose broadly diverse and excellent student bodies. For example, Amici consider whether the applicant is the first in the family to attend college, whether he or she comes from a disadvantaged background, and whether languages other than English are spoken in the home. Amici also engage in substantial outreach and recruiting efforts aimed at increasing the size and diversity of the applicant pool. Furthermore, Amici have adopted financial aid policies designed to enable a wide variety of admitted students from all backgrounds to attend. These efforts have played an important role in contributing to the diversity, including racial and ethnic, of the student bodies of Amici institutions. But racial and ethnic diversity are a distinct kind of difference in background, and reliance on such race-neutral measures alone cannot substitute for individualized, holistic review that takes account of race and ethnicity of the type approved of by *Grutter*.<sup>78</sup>

The only citation was to a law review article “collecting studies showing that reliance on socioeconomic status as an admissions factor alone cannot produce racial diversity.”<sup>79</sup>

Beyond percentage plans, we might draw from Amherst and Brown that socioeconomic status, on its own, is not a sufficient proxy for race-conscious admissions, and the cost is the diversity of their institutions. This opinion has been footnoted, with sources, in those two briefs. The nightmare scenario described in Amherst’s brief, where the number of black and Hispanic admitted students are cut in half, those admitted are

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75. Brief for Brown, *supra* note 71, at 7–8.

76. Brief for Amherst, *supra* note 70, at 22.

77. *Id.* at 22–23.

78. Brief for Brown, *supra* note 71, at 16–17.

79. *Id.* at 17.

more poorly prepared, yield on black and Hispanic students plummets, and the only black and Hispanic students in selective colleges and universities are poor, is limited to a system where socioeconomic factors are the sole race-neutral ones.<sup>80</sup>

Only the University of California's amicus brief comprehensively tackles the question of race-neutral alternatives. The University of California, uniquely among amici, had been banned under California's Constitution from using race-conscious admissions policies since 1996.<sup>81</sup> Instead, the University expanded outreach efforts to "low-income families or those with little or no previous experience with higher education, or attend a school that is educationally disadvantaged."<sup>82</sup> It adopted a plan analogous to the Texas percentage plan.<sup>83</sup> It reduced emphasis on standardized testing.<sup>84</sup> Finally, it implemented a holistic system where

'merit should be assessed in terms of the full range of an applicant's academic and personal achievements and likely contribution to the campus community, viewed in the context of the opportunities and challenges that the applicant has faced'; and that '[c]ampus policies should reflect continued commitment to the goal of enrolling classes that exhibit academic excellence as well as diversity of talents and abilities, personal experience, and backgrounds.'<sup>85</sup>

The University concluded that these policies were not sufficient—black enrollment at UC Berkeley, for example, never recovered to race-conscious levels, falling from 7.3% in 1995 to 3.4% in 2012.<sup>86</sup>

Even if Kennedy had been inclined to strike down the University of Texas program, there are serious questions about whether the race-neutral alternatives used in Texas are workable for all colleges and universities, particularly private and selective colleges and universities outside of Texas. The University of California's amicus brief is somewhat instructive on this front—its experience using race-neutral alternatives has been less successful than in Texas—but not only does the University of California's experience raise questions about what counts as workable (is a drop in black enrollment from 7.3% to 3.9% workable, for instance?), the University of California is also a large, public university that has at its

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80. *See id.* at 22–23.

81. CAL. CONST. art. 1, § 31.

82. Brief for Univ. of Cal., *supra* note 61, at 22.

83. *See id.* at 23.

84. *See id.* at 22.

85. *Id.* at 26 (quoting Guidelines for Implementation of University Policy on Undergraduate Admissions, <http://www.ucop.edu/sas/adguides.html>).

86. *See id.* at 22; *UC Berkeley Fall Enrollment Data*, BERKELEY OFFICE OF PLANNING & ANALYSIS, <http://opa.berkeley.edu/statistics/enrollmentdata.html> (last visited Dec. 3, 2013).

disposal race-neutral tools like percentage plans that other private colleges and universities cannot use. The amicus briefs from every other college and university filed in *Fisher* failed to adequately address the issue of race-neutral alternatives.

#### B. Hidden Race-Neutral Alternatives in the College and University Amicus Briefs

As we have seen, race-neutral alternatives include any admissions tools that may increase racial diversity as long as they do not divide applicants by race-based categories, even if those tools are motivated by race consciousness. But this subtlety, which only became fully clear with Kennedy's decision in *Fisher*, means that the focus of the college and university amicus briefs on percentage plans and socioeconomic affirmative action was far too narrow. The briefs assumed that race-neutral alternatives and race consciousness are incompatible. For example, Amherst said that "if liberal arts institutions are to fulfill their educational missions, colleges *have to* be sensitive to race in making admissions decisions."<sup>87</sup> That need "stems directly from continuing disparities in pre-collegiate academic achievements of black and white students' as presently measured."<sup>88</sup> In assembling a class,

there is really no possibility of a *race-blind* admission process: consciousness of *all* the diversity each applicant would contribute is unavoidable. There is no alternative for these colleges but to accept the reality of this consciousness of differences (including racial or ethnic background) and to use it intelligently as part of their complex weighing of multiple factors leading to admission decisions.<sup>89</sup>

Similarly, Brown wrote that it is not apparent "why universities should, at this point in our nation's evolving understanding of race, be forced to will ignorance with respect to race. As this Court has recognized, race continues to influence our experiences."<sup>90</sup> Brown's brief worried that "racial and ethnic diversity are a distinct kind of difference in background, and reliance on such race-neutral measures alone cannot substitute for individualized, holistic review that takes account of race and ethnicity. . . ."<sup>91</sup>

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87. Brief for Amherst, *supra* note 70, at 15.

88. *Id.* (quoting WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER* 51 (1998)).

89. *Id.* at 21.

90. Brief for Brown, *supra* note 71, at 12.

91. *Id.* at 17.

When the college and university amicus briefs used terms such as “race-neutral” and “race-blind” and “race consciousness,” they betray a miscommunication between court and amici about the definition of race-neutral. In fact, many of the admissions tools described by the briefs are race-neutral, even if the briefs do not recognize them as such. And presumably there are more tools being used that amici simply failed to mention.

Looking back at Amherst’s brief, we see a host of race-neutral alternatives that are already being employed by the amici but not acknowledged as race-neutral.<sup>92</sup> For instance, Amherst considers “the extent and depth of the candidate’s nonacademic achievement and leadership,” “the candidate’s socio-economic status,” “particular personal, family, and economic hurdles faced by the candidate and/or immediate or extended family,” “ongoing and prospective support from extended family, community based organizations, opportunity programs, or religious organizations,” and “educational attainment of siblings.”<sup>93</sup> In assessing these characteristics, amici rely on demographic factors, essays, resumes, and recommendations.<sup>94</sup> When an applicant writes about the cultural traditions in her family, reveals that her parents did not attend college or university, is connected with community organizations that work, in particular, with black and Hispanic students—these factors may closely parallel race, but they are race-neutral.

While Brown only describes “whether the applicant is the first in the family to attend college, whether he or she comes from a disadvantaged background, and whether languages other than English are spoken in the home” as race-neutral, its brief references other race-conscious programs that are facially race neutral.<sup>95</sup> As already noted, Brown’s brief highlights the holistic application reading process where amici “looks to compose a student body that is exceptional, complementary, and diverse in many ways. In service of this goal, each institution seeks, and invites applicants to submit, any relevant information about their background to understand how the applicant might contribute to the vibrancy of the student body.”<sup>96</sup> Of course under a race-neutral regime the check box where an applicant might reveal race can no longer be a factor in admission, but all of that “relevant information” includes “weighing your many talents, your academic and extracurricular interests, your diverse histories.”<sup>97</sup>

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92. Brief for Amherst, *supra* note 70, at 11–12.

93. *Id.* at 12.

94. *Id.*

95. Brief for Brown, *supra* note 71, at 16.

96. *Id.* at 8.

97. *Id.* at 10 (quoting Shirley M. Tilghman, 2005 *Opening Exercises Greeting and Address*, PRINCETON UNIV. (Sept. 2005), <http://www.princeton.edu/president/tilghman/speeches/20050911/>).



The California Institute of Technology mistakes programs that are race-neutral for race-conscious.

[T]he race of an applicant is considered along with the candidate's other characteristics to determine the contribution that student would likely make to the university community. For example, a white student from a majority-minority high school might write an essay that illustrates how this combination of race and experience would make a particularly interesting addition to the dialogue on campus.<sup>98</sup>

While race is a subject of the student's essay in the example, the student's understanding of race and the student's experiences, as expressed in her essays, are race-neutral. The brief similarly mentions race-neutral alternatives that are already part of amici's repertoire, without calling them race-neutral. Notably, "[a]dmissions officers at the amici universities consider a wide range of information that provides them a sense of the student as an individual."<sup>99</sup> Among those mentioned are application essays, recommendations, additional letters of recommendation, and electronic media.<sup>100</sup>

Indeed, Harvard's *Grutter* amicus brief contained this sentence:

[t]he United States cites as possible [race-neutral alternative] factors, 'a history of overcoming disadvantage, geographic origin, socioeconomic status, challenging living or family situations, reputation and location of high school, volunteer and work experiences, exceptional personal talents, leadership potential, communication skills, commitment and dedication to a particular cause, extracurricular activities, extraordinary expertise in a particular area, and individual outlook as reflected by essays.' Amici already give significant favorable consideration to all of these factors.<sup>101</sup>

What Harvard missed in 2004 was how these factors and more could be used as deliberate proxies for race.

### III. THE FIFTH CIRCUIT ON REMAND

A year after the *Fisher* decision, the Fifth Circuit issued its decision on remand. The Fifth Circuit was charged with determining if there were any

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98. Brief for Cal. Inst. of Tech., *supra* note 69, at 25.

99. *Id.* at 26.

100. *See Id.* at 26–27.

101. Brief for Harvard Univ. et al. as Amici Curiae Supporting Respondents at 22 n. 13, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) (internal citation omitted).

workable race-neutral alternatives to the University of Texas's race-conscious affirmative action program, but it seemed to miss its charge again. In upholding the University of Texas's program for the second time, the court continued to defer to the University's summary conclusion that race-neutral alternatives are insufficient.<sup>102</sup>

The court devoted significant time outlining all of the University of Texas's race-neutral efforts, from the top ten percent plan to other forms of recruitment and outreach.<sup>103</sup> Were these efforts insufficient to bring diversity to the University of Texas without race-conscious affirmative action? The Fifth Circuit never answered the question. Noting that the number of black and Latino students actually increased using exclusively race-neutral methods, the court then lamented how the percentage of these students then became stagnant.<sup>104</sup> As the dissent pointed out, the University of Texas's goal is entirely unclear.<sup>105</sup> What population of black and Latino students would indicate the race-neutral methods were working? The University of Texas never defined its goal, and now the court deferred to a vague notion that the status quo is not enough.

The Fifth Circuit proposed an alternative rationale for why the top ten percent plan was insufficient for achieving diversity:

[A] significant number of students excelling in high performing schools are passed over by the Top Ten Percent Plan although they could bring a perspective not captured by the admissions along the sole dimension of class rank. For example, the experience of being a minority in a majority-white or majority-minority school and succeeding in that environment offers a rich pool of potential UT Austin students with demonstrated qualities of leadership and sense of self.<sup>106</sup>

The court saw the race-conscious program as a way of fine tuning the quality of diversity present in the class. But when Fisher presented counter arguments, suggesting, for example, that perhaps an admissions program that uses socioeconomic factors instead of race could be equally as effective at boosting this form of diversity, the court demurred: “[w]e are ill-equipped to sort out race, class, and socioeconomic structures.”<sup>107</sup> This is the definition of deference.

Should the Fifth Circuit have remanded to the district court? It decided that “there are no new issues of fact that need to be resolved, nor is there

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102. See *Fisher v. Univ. of Tex.*, 758 F.3d 633, 661 (5th Cir. 2014).

103. See *id.* at 647–49.

104. See *id.* at 648–50.

105. See *id.* at 667 (Garza, J., dissenting).

106. *Id.* at 653.

107. *Fisher*, 758 F.3d. at 657.

any identified need for additional discovery. . . .”<sup>108</sup> But if the Fifth Circuit had followed the instructions of the Supreme Court, then there are many unresolved issues of fact: what is the ultimate goal of race-conscious affirmative action, what constitutes a critical mass of black and Latino students, what race-neutral alternative means could be used to achieve that goal or critical mass, what race-neutral tools can work in various collegiate settings? These are the very things that amicus briefs could reveal.

#### IV. CONCLUSION

The examples drawn from the *Fisher* amicus briefs are perhaps just the tip of the iceberg for race-neutral alternatives already being employed by colleges and universities. This is the true face of affirmative action—and much of it is already race neutral. Colleges and universities do not have to be shy about the importance of race in their diverse communities. Thanks to *Grutter* and *Fisher*, serious, thoughtful consideration of the place of race in colleges and universities is a constitutionally protected compelling interest. The Supreme Court has made a distinction between the legitimate goal of diversity and the methods by which it can be achieved, but has given broad latitude to colleges and universities by asking them to find workable, facially race-neutral alternatives. *Fisher* suggests that proxies for race are not off limits, and while some justices and past cases have given mixed messages about the constitutionality of proxies for race, and this fact warrants a degree of caution, *Fisher* encourages racially motivated, yet facially race-neutral, admissions practices. To date, most colleges and universities have not shown the Court how many of their admissions practices, while racially motivated, may in fact conform to Kennedy’s definition of race-neutral.

Not only are colleges and universities constitutionally required to use workable race-neutral alternatives before employing race-conscious affirmative action, there may be huge advantages for the institutions that discover many of their current policies are facially race-neutral. First and foremost, proving that there are no workable race-neutral alternatives is not likely to be easy. How should a college or university prove a negative? At what point have all workable race-neutral alternatives been exhausted? Can socioeconomic affirmative action bring the same kind of diversity as selecting a class using race as one explicit criterion? Colleges and universities can hardly show the workability of race-neutral alternatives without talking about the goal of those alternatives—the notion of a critical mass of black and Latino students—and the nebulous nature of “critical mass” has been hotly debated. In essence, *Fisher* gives colleges and universities permission to ignore these complex issues—and the extensive

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108. *Id.* at 641.

literature addressing them—because these institutions do not need to demonstrate workability as long as the tools are facially race-neutral. Indeed, in *Grutter*, O'Connor placed an endpoint on the use of race-conscious affirmative action. Her admonition that “race-conscious admissions policies must be limited in time”—she proposed twenty-five years with the clock beginning in 2003—may not apply to such race-neutral alternatives.<sup>109</sup> Of course a future court may establish limits on race-neutral alternatives; for example, just because a college or university uses race-neutral alternatives likely does not mean they can use these to create unconstitutional racial quotas. But if used properly, race-neutral alternatives may open up new, constitutional pathways to diversity unhindered by many of the complications of earlier affirmative action jurisprudence.

The day will come when Kennedy, or his successor, will apply the standard described in *Fisher*, and that Justice will rely on college and university amicus briefs in crafting his or her opinion. Going forward, colleges and universities should embrace the freedom that *Grutter* and *Fisher* have afforded them by remaining conscious of race while examining which systems, many of which are already in place, are race-neutral. The framework for such a system is already at the core of a holistic admissions process.

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109. *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003).



*OLIVER* WITH A TWIST: THE NCAA’S  
NO-AGENT RULES APPLIED TO NON-LAWYER  
REPRESENTATIVES OF BASEBALL  
STUDENT-ATHLETES

JERRY R. PARKINSON\*

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I. INTRODUCTION

The NCAA’s prohibition against student-athletes retaining agents to represent them in negotiations for professional contracts (at least for those student-athletes seeking to retain their eligibility) has come under scrutiny for many years.<sup>1</sup> Problems are particularly acute in the sport of baseball—due to the timing of the annual First-Year Player Draft and Major League

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1. See, e.g., Jan Stiglitz, *NCAA-Based Agent Regulation: Who Are We Protecting?*, 67 N.D. L. REV. 215 (1991); Thomas R. Kobin, Comment, *The National Collegiate Athletic Association’s No Agent and No Draft Rules: The Realities of Collegiate Sports Are Forcing Change*, 4 SETON HALL J. SPORT L. 483 (1994).

Baseball (MLB) rules governing draft eligibility.<sup>2</sup> The draft is conducted in June each year, roughly at the end of baseball players' seasons.<sup>3</sup> Prior to the draft, players are focused on the classroom and ballfield and typically do not have the time or the knowledge to prepare adequately for draft negotiations with MLB clubs.<sup>4</sup>

Draft eligibility also creates unique problems: essentially, baseball players are draft-eligible at the end of their senior year in high school and again at the end of their junior year in college.<sup>5</sup> (College players completing their senior year also are draft-eligible, but because they will have exhausted their eligibility to compete at an NCAA institution, the retention of an agent after completing their final season causes no concerns from a rules-compliance perspective.) High school draft prospects may wish to play college ball, and college juniors may wish to return for their senior years to compete one last season with their college teammates. But if they seek advice regarding their options from agents or other representatives, they risk jeopardizing their college eligibility.

The fundamental concern is that young baseball players—even if they were not preoccupied with their other responsibilities in the classroom and on the ballfield—are seldom equipped to negotiate effectively with representatives of MLB clubs, who typically are experienced, sophisticated negotiators.<sup>6</sup> To try to level the playing field, student-athletes almost uniformly retain agents or other advisors to assist them in the draft process.<sup>7</sup> The NCAA's "no-agent rule"—hire an agent and lose eligibility to compete at an NCAA institution<sup>8</sup>—obviously creates a significant roadblock for players who wish to have assistance in draft negotiations, yet still retain the option to compete (or continue competing) in college baseball.

In 2009 a state court judge in Ohio recognized the clear disparity in bargaining power between MLB clubs and student-athletes.<sup>9</sup> In a case involv-

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2. See generally Richard T. Karcher, *The NCAA's Regulations Related to the Use of Agents in the Sport of Baseball: Are the Rules Detrimental to the Best Interest of the Amateur Athlete?*, 7 VAND. J. ENT. L. & PRAC. 215 (2005).

3. *First-Year Player Draft—Official Rules*, MLB.COM, <http://mlb.mlb.com/mlb/draftday/rules.jsp> (last visited Mar. 17, 2015) [hereinafter "Official Rules"].

4. Karcher, *supra* note 2, at 222.

5. See Official Rules, *supra* note 3. Draft-eligible players include high school graduates who have not attended college, junior college players, and four-year college players "who have either completed their junior or senior years or are at least 21 years old." *Id.*

6. See Karcher, *supra* note 2, at 224.

7. Katie Thomas, *Baseball Star Challenges N.C.A.A. Rule*, N.Y. TIMES, Oct. 4, 2008, at D1 ("Virtually every player has an agent – call them a lawyer, call them an advisor, there's no difference.") (quoting an MLB executive speaking on condition of anonymity).

8. See *infra* text accompanying notes 41–43.

9. The NCAA considers "student-athletes" to include only individuals currently

ing Andrew Oliver, a pitcher at Oklahoma State University, the court held that an NCAA rule prohibiting a student-athlete's attorney from being present during negotiations between the student-athlete and an MLB club was arbitrary and capricious, noting that the rule "stifles what attorneys are trained and retained to do."<sup>10</sup> The *Oliver* court's injunction in favor of the student-athlete drew considerable attention because it represented a rare defeat for the NCAA<sup>11</sup> and threatened the NCAA's enforcement of the no-agent rule. After the decision, however, the parties settled the case for a reported \$750,000, with the stipulation that the court's injunction be vacated.<sup>12</sup>

So the *Oliver* issue remains on the table. The NCAA continues to enforce its rule against lawyers participating in negotiations between their clients and MLB representatives. The *Oliver* decision calls into question the legality and enforceability of that rule. But the *Oliver* decision, even if it had not been vacated, was narrow in scope and grounded explicitly in the attorney-client relationship and the role attorneys play in representing their clients.<sup>13</sup> Even though one can argue, particularly after *Oliver*, that the NCAA's no-attorney restriction treads too heavily on the attorney-client relationship, at least the rule is clear: the student-athlete may not have a lawyer present during negotiations with an MLB club.

But what about non-lawyer representatives? The NCAA's broader no-agent rules also are clear (at least on their face), but not all student-athlete representatives are "agents." The NCAA does allow student-athletes to retain "advisors" to assist them in the MLB draft process.<sup>14</sup> What if a student-athlete, seeking to preserve the option of competing in college, is careful *not* to hire an attorney to represent him, but instead retains a non-attorney "advisor"? In what activities can such advisors engage before they cross a line and become "agents"—thereby jeopardizing their clients' college eligibility?

The latter questions are the focus of this article. The article begins with

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enrolled as students at an NCAA member institution. See NAT'L COLLEGIATE ATHLETIC ASS'N, 2014–15 DIVISION I MANUAL, Bylaw 12.02.12. (The Manual is available online at [www.ncaapublications.com](http://www.ncaapublications.com). Hereinafter, Manual provisions will be cited simply to "NCAA Bylaws.") High school seniors would be considered "prospective student-athletes." See NCAA Bylaw 13.02.12. For simplicity of discussion, however, this article uses the term student-athlete to include both types of MLB draft prospects—high school seniors and college juniors.

10. *Oliver v. Nat'l Collegiate Athletic Ass'n*, 155 Ohio Misc. 2d 17, 32 (Com. Pl. 2009).

11. See T. Matthew Lockhart, *Oliver v. NCAA: Throwing a Contractual Curveball at the NCAA's "Veil of Amateurism,"* 35 U. DAYTON L. REV. 175, 186–88 (noting courts' general deference to NCAA in past litigation).

12. *Id.* at 178.

13. See *Oliver*, 155 Ohio Misc. 2d at 31–33.

14. See *infra* text accompanying notes 53–54.



an overview of *Oliver* because the case does represent an extraordinary defeat for the NCAA and also serves as a good introduction to the NCAA's broader concerns about student-athletes' use of agents. The article next examines the relevant rule structure the NCAA has adopted to address concerns about amateurism. The article then shifts the focus to the specific problem of applying the no-agent rules to non-lawyer representatives of baseball student-athletes, using a recent case as an example. The article concludes with a few modest suggestions for the NCAA and its member institutions in their application of amateurism rules in this particular context.

## II. THE *OLIVER* CASE

Andy Oliver's troubles with the NCAA began during his senior year of high school in Vermilion, Ohio.<sup>15</sup> Anticipating that an MLB club might draft him in June 2006, shortly after his high school graduation, Oliver and his family retained the services of the Icon Sports Group—specifically attorneys Robert and Tim Baratta—in February 2006.<sup>16</sup> Sure enough, the Minnesota Twins drafted Oliver in the 17<sup>th</sup> round during the First-Year Player Draft in June.<sup>17</sup> During a meeting later that summer, representatives of the Twins met with Oliver and his father at their family home in Ohio, offering Oliver a \$390,000 signing bonus to join the Twins.<sup>18</sup> On the advice of his father, Oliver turned down the offer and later enrolled at Oklahoma State University, where he pitched on scholarship for the Cowboys during his freshman and sophomore years.<sup>19</sup>

Unfortunately for Oliver, one of his attorneys, Tim Baratta, had attended the meeting between the Olivers and the Twins representatives in the summer of 2006.<sup>20</sup> This was in violation of NCAA Bylaw 12.3.2.1, which stated (and still states):

A lawyer may not be present during discussions of a contract offer with a professional organization or have any direct contact (in person, by telephone or by mail) with a professional sports organization on behalf of the individual. A lawyer's presence during such discussions is considered representation by an agent.<sup>21</sup>

To be clear, the plain language of the bylaw made Baratta's presence during the meeting a violation. Baratta was a lawyer representing Oliver at the

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15. *See Oliver*, 155 Ohio Misc. 2d at 22.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 22–23.

20. *Id.* at 22.

21. NCAA Bylaws, *supra* note 9, § 12.3.2.1.

time, so his “presence” during contract discussions in the Oliver home is “considered representation by an agent” by the NCAA, in violation of the broader no-agent rule.

Thus, after the violation was discovered, the only possible legal challenge Oliver had was to attack the rule itself, which he did. After Oklahoma State University suspended him in May 2008—not only for allowing Baratta to be present during the contract discussions, but also for allowing the Barattas “to contact the Minnesota Twins by telephone”<sup>22</sup>—Oliver brought an action in the Ohio Court of Common Pleas.

The Ohio state court judge issued a temporary restraining order in Oliver’s favor in the summer of 2008.<sup>23</sup> The NCAA, however, still considered Oliver to be ineligible, so in October 2008 the university petitioned the NCAA for reinstatement of Oliver’s eligibility.<sup>24</sup> In December the NCAA suspended Oliver for one full season, but after an appeal reduced that suspension to seventy percent of the season.<sup>25</sup>

Oliver continued to press his action in the Ohio court, seeking both declaratory and injunctive relief against enforcement of NCAA Bylaw 12.3.2.1.<sup>26</sup> The court recognized that the attorney’s presence clearly violated the rule, but the rule itself was subject to challenge: “Was Baratta’s presence in that room a clear indication that [Oliver] . . . was a professional? According to Bylaw 12.3.2.1, . . . he was. As such the following issues must be resolved: Is the . . . rule against the public policy of Ohio? Is it arbitrary? Is it capricious?”<sup>27</sup>

The court answered the latter two questions in the affirmative, and at least implicitly determined the NCAA rule invalid as against public policy as well:

For a student-athlete to be permitted to have an attorney and then to tell that student-athlete that his attorney cannot be present during the discussion of an offer from a professional organization is akin to a patient hiring a doctor, but the doctor is told by the hospital board and the insurance company that he cannot be present when the patient meets with a surgeon because the conference may improve his patient’s decision-making power. Bylaw 12.3.2.1 is unreliable (capricious) and illogical (arbitrary) and indeed stifles what attorneys are trained and retained to do.

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22. *Oliver*, 155 Ohio Misc. 2d at 23.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 24.

27. *Id.* at 32.

This court appreciates that a fundamental goal of the member institutions and the [NCAA] is to preserve the clear line of demarcation between amateurism and professionalism. However, to suggest that Bylaw 12.3.2.1 accomplishes that purpose by instructing a student-athlete that his attorney cannot do what he or she was hired to do is simply illogical. . . .

. . . [N]o entity, other than that one designated by the state, can dictate to an attorney where, what, how, or when he should represent his client. . . . If the [NCAA] intends to deal with this athlete or any athlete in good faith, the student-athlete should have the opportunity to have the tools present (in this case an attorney) that would allow him to make a wise decision without automatically being deemed a professional, especially when such contractual negotiations can be overwhelming even to those who are skilled in their implementation.<sup>28</sup>

The *Oliver* decision was a strong rebuke to the NCAA, which argued that as a voluntary association of member schools, its bylaws were presumptively valid and “rationally related to . . . preserving the amateur model of collegiate athletics.”<sup>29</sup> Those arguments certainly have carried the day in prior court challenges to NCAA enforcement of its bylaws.<sup>30</sup> But Judge Tone of the Ohio Court of Common Pleas was simply not prepared to grant that much deference to the Association: “Just because member institutions agree to a rule or bylaw does not mean that the bylaw is sacrosanct or that it is not arbitrary or capricious.”<sup>31</sup>

As noted previously, the court’s injunction against the enforcement of Bylaw 12.3.2.1 was vacated as part of a settlement that also included a reported \$750,000 payment by the NCAA to Oliver and his attorney.<sup>32</sup> Since 2009, then, the NCAA has continued to enforce the rule, even though the *Oliver* decision calls into question the rule’s viability.

The *Oliver* decision focused specifically on Bylaw 12.3.2.1 and whether preventing an attorney’s participation in contract negotiations unduly interfered with the attorney-client relationship. By noting that “no entity, other than that one designated by the state,” can regulate attorney conduct,<sup>33</sup> the court also seemed to ground its decision in the well-recognized principle that regulation of attorney conduct is exclusively the province of *state* regu-

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28. *Id.* at 32–33.

29. *Id.* at 25.

30. See Lockhart, *supra* note 11, at 186–88.

31. *Oliver*, 155 Ohio Misc. 2d at 33–34.

32. Pat Borzi, *Settlement Sheds Little Light on N.C.A.A. No-Agent Rule*, N.Y. TIMES (July 23, 2010), <http://www.nytimes.com/2010/07/24/sports/baseball/24advisers.html>.

33. *Oliver*, 155 Ohio Misc. 2d at 33.

lators, particularly state supreme courts.<sup>34</sup> (Oliver had argued that the Barattas, as Ohio attorneys, were “subject to the exclusive regulation of the Ohio Supreme Court. Therefore, the [NCAA] has no authority to promulgate a rule that would prevent a lawyer from competently representing his client.”<sup>35</sup>)

Despite its attorney-specific ruling, however, *Oliver* is also about the fundamental unfairness of requiring young student-athletes to negotiate with MLB clubs without help: “[T]he student-athlete should have the opportunity to have the tools present . . . that would allow him to make a wise decision . . . especially when such contractual negotiations can be overwhelming even to those who are skilled in their implementation.”<sup>36</sup> The “tool” at issue in *Oliver* was an attorney, but the same rationale applies to non-attorney representatives who might assist the student-athlete in making a wise decision.

This article focuses not on the attorney-specific aspects of the *Oliver* case, but on broader *agent* issues—after all, NCAA Bylaw 12.3.2.1 is a subsection of NCAA Bylaw 12.3 of the NCAA rulebook, which is entitled “Use of Agents.”<sup>37</sup> While even the *presence* of an attorney during contract negotiations constitutes a violation, the application of the bylaws to non-attorney representatives of student-athletes is not so clear. For example, the *Oliver* court noted that the NCAA “permits student-athletes and their parents to negotiate contracts while in the presence of a sports representative,” but only if that representative is a non-attorney.<sup>38</sup> That may be a reasonable interpretation of the bylaws, but in reality, seldom will a student-athlete be in the clear with a non-attorney “sports representative” present for negotiations.

### III. THE BYLAWS

The NCAA Division I Manual devotes an entire chapter, or “article,” to “Amateurism.” Article 12 begins with two ideals: (1) “Only an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport.”<sup>39</sup> (2) “Member institutions’ athletics programs are designed to be an integral part of the educational program[,]” so NCAA institutions must maintain “a clear line of demarcation between college athletics and

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34. See, e.g., 7 C.J.S. *Attorney & Client* § 2 (2004) (“The practice of law is a privilege . . . bestowed upon certain persons . . . upon such terms and conditions as the state may fix.”).

35. *Oliver*, 155 Ohio Misc. 2d at 24.

36. *Id.* at 33.

37. NCAA Bylaws, *supra* note 9, § 12.3.

38. 155 Ohio Misc. 2d at 32.

39. NCAA Bylaws, *supra* note 9, § 12.01.1.

professional sports.”<sup>40</sup> A multitude of rules (“bylaws”) put flesh on these two basic principles, but this article will focus on a handful of rules that apply directly to the use of representatives in negotiating MLB contracts.

The starting point is NCAA Bylaw 12.1.2, which states that “[a]n individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual . . . [e]nters into an agreement with an agent.”<sup>41</sup> A subsequent bylaw related to negotiations surrounding a professional draft provides that a student-athlete, his parents or legal guardians, or an institution’s “professional sports counseling panel” may negotiate with a professional team without the student-athlete losing his amateur status.<sup>42</sup> However, a student-athlete “who retains an agent shall lose amateur status.”<sup>43</sup>

Thus, the NCAA legislation is clear that retention of an agent will render a student-athlete ineligible. But when is a representative an “agent”? In 2012 the NCAA approved an expanded definition of “agent.”<sup>44</sup> NCAA Bylaw 12.02.1 now states:

An agent is any individual who, directly or indirectly:

- a) Represents or attempts to represent an individual for the purpose of marketing his or her athletics ability or reputation for financial gain; or
- b) Seeks to obtain any type of financial gain or benefit from securing a prospective student-athlete’s enrollment at an educational institution or from a student-athlete’s potential earnings as a professional athlete.

**12.02.1.1 Application.** An agent may include, but is not limited to, a certified contract advisor, financial advisor,

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40. *Id.* § 12.01.2.

41. *Id.* § 12.1.2-(g). NCAA Bylaw 12.1.2 also addresses other ways in which a student-athlete can lose amateur status, including accepting pay to play, signing a professional contract, competing for a professional team, or entering a professional draft. Unlike in other sports, such as basketball and football, a baseball player need not “enter” the MLB draft by officially declaring for the draft; MLB clubs simply draft student-athletes who are eligible—i.e., high school seniors and college juniors. Official Rules, *supra* note 3; *see also* Borzi, *supra* note 32.

42. NCAA Bylaws, *supra* note 9, § 12.2.4.3. Another bylaw, 12.3.4, permits an NCAA member university to create a professional sports counseling panel to advise student-athletes regarding potential professional careers. The creation of such a panel, however, is strictly optional, and many universities do not have such a panel. For more information regarding the panels, see Karcher, *supra* note 2, at 218–19, 223–24. Karcher notes that even those universities that do provide such a service to their student-athletes may have an inherent conflict of interest in wanting their junior ballplayers to return to school rather than turn professional. *Id.* at 224. Moreover, the panels are unavailable to high school draft prospects. *Id.*

43. NCAA Bylaws, *supra* note 9, § 12.2.4.3.

44. *See id.* § 12.02.1 (noting adoption of agent definition on January 14, 2012).

marketing representative, brand manager or anyone who is employed or associated with such persons.<sup>45</sup>

The definition tracks language that has been included for many years in NCAA Bylaw 12.3 on “Use of Agents.” That rule makes a student-athlete ineligible for intercollegiate competition if the student-athlete “ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in [a] sport.”<sup>46</sup> The bylaw also renders a student-athlete ineligible for accepting “transportation or other benefits” from (1) “[a]ny person who represents any individual in the marketing of his or her athletics ability” or (2) “[a]n agent, even if the agent has indicated that he or she has no interest in representing the student-athlete in the marketing of his or her athletics ability or reputation and does not represent individuals in the student-athlete’s sport.”<sup>47</sup>

Agents, then, are clearly off-limits to student-athletes who seek to compete (or to continue competing) at the intercollegiate level. Collectively, these bylaws can be considered a forceful NCAA “no-agent rule.” Yet the bylaws, including the bylaw defining an “agent,” still leave ambiguities in their application—at least in the sport of baseball, where the NCAA permits players to use an “advisor.”<sup>48</sup> What does seem clear, however, is the NCAA’s focus on two particular activities that will render an advisor an agent: (1) the *marketing* of a student-athlete’s athletics ability or reputation, and (2) the participation in *negotiations* with an MLB club.

Finally, NCAA Bylaw 12.3.2 addresses the conduct at the heart of the *Oliver* case—a student-athlete’s retention of a *lawyer* to secure advice about a professional contract. The bylaw begins with a seeming exception to the no-agent rule: “Securing advice from a lawyer concerning a proposed professional sports contract shall not be considered contracting for representation by an agent under this rule . . . .”<sup>49</sup> But the rule immediately begins to chip away at what such an attorney can do: “unless the lawyer also represents the individual in *negotiations* for such a contract.”<sup>50</sup> And as we saw in *Oliver*, lawyers are also explicitly excluded from even being “*present* during discussions of a contract offer with a professional organization” and from “direct contact (in person, by telephone or by mail) with a professional sports organization on behalf of the individual.”<sup>51</sup>

NCAA Bylaw 12.3.2 severely restricts the use of a lawyer representative. The rule permits the lawyer to give advice to the student-athlete re-

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45. *Id.* (date of adoption omitted).

46. *Id.* § 12.3.1 (noting adoption in 1997).

47. *Id.* § 12.3.1.2.

48. *See infra* text accompanying notes 53–54.

49. NCAA Bylaws, *supra* note 9, § 12.3.2.

50. *Id.* (emphasis added).

51. *Id.* § 12.3.2.1 (emphasis added).

garding the terms of a contract proffered by an MLB club, but it prevents the lawyer from engaging in negotiations with the club on behalf of the client. Indeed, any “direct contact” with an MLB club by a lawyer on behalf of a client is prohibited. (It bears repeating that these restrictions apply only to student-athlete clients that wish to preserve their option of future collegiate competition. Any MLB draftee is free to use an agent—attorney or otherwise—in negotiations as long as the draftee understands that he will no longer be eligible to compete at an NCAA institution.)

The *Oliver* court’s discomfort with NCAA Bylaw 12.3.2 is understandable. An attorney’s usefulness to a client is seriously impaired if the attorney is unable to represent that client *fully*, by engaging directly with the parties on the other side of the bargaining table. But again, the rules are clear, and if a student-athlete like Andy Oliver decides to engage an attorney to represent him directly with an MLB club, the student-athlete should be fully aware of the risks to his collegiate eligibility.

It is not surprising, in light of NCAA Bylaw 12.3.2, that some student-athletes who wish to preserve all of their options will avoid attorney representatives. If they seek help in the draft process, they steer instead toward non-attorney representatives. The perils that come with that choice are the focus of the remainder of this article.

#### IV. APPLICATION OF THE BYLAWS TO NON-LAWYER REPRESENTATIVES

##### A. The “Advisor” Trap

The NCAA bylaws and their interpretations create a trap for the unwary. As noted above, NCAA Bylaw 12.3.2 explicitly singles out lawyer representatives for special treatment, prohibiting their direct contact with MLB clubs and their presence at discussions with club representatives relating to contract offers.<sup>52</sup> Naturally, one might presume that non-lawyers, by their absence from the bylaw, have more latitude—that is, they *can* contact MLB clubs directly and be present during contract negotiations, but *not* if they’re acting as “agents.” Agents are always off-limits due to the no-agent rules.

If that were not challenging enough, the NCAA has introduced a third category of representatives into the mix—“advisors.” Guidance available on the NCAA website poses a series of questions and answers geared toward college juniors who are becoming draft-eligible.<sup>53</sup> One of those questions asks, “Am I permitted to have an advisor during this [draft] process?”

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52. NCAA Bylaws, *supra* note 9, § 12.3.2.

53. NCAA Memorandum from Mark Hicks, Managing Director of Enforcement, and Kris Richardson, Director of Academic and Membership Affairs, to Division I Baseball Student-Athletes with Remaining Eligibility (Mar. 6, 2014) (on file with author), available at <http://paperzz.com/doc/379817/memorandum-march-6-2014-to-division-i-baseball-ncaa> [hereinafter NCAA Informational Memo].

The answer is “YES!”—in bold letters and green ink (as opposed to red ink for the “NO!” answers).<sup>54</sup>

The task for draft prospects (or draftees), then, becomes clear—how to navigate the waters between an “agent” and an “advisor.” Those waters become particularly treacherous when one realizes that the same individual can wear both hats. For example, a certified agent with the Major League Baseball Players Association can market and negotiate on behalf of one client, but still hold himself out as a mere “advisor” to assist another client who seeks to preserve his amateurism options.<sup>55</sup>

Young student-athletes and their parents are susceptible to representations by agents that they can serve as “advisors” and not jeopardize the student-athletes’ collegiate eligibility. But as the NCAA has made clear in its guidance, the *label* one uses is not determinative; the *activities* in which the representative engages will determine whether one is an agent or merely an advisor.<sup>56</sup> Again, the focus seems to be on “marketing” a student-athlete’s athletics ability or reputation or actively engaging on the student-athlete’s behalf in negotiations for a professional contract.<sup>57</sup>

The NCAA guidance, however, goes further. After informing student-athletes that “YES!” you can have an advisor, the memo states:

[T]his advisor may not serve as a link between you and the professional sports team. . . . If the advisor has direct contact with a professional team regarding you or your status, whether independently or per your request or direction, the advisor shall be considered an agent and you will have jeopardized your eligibility at an NCAA school. For example, an advisor may not be present during the discussions of a contract offer with a professional team or have any direct contact (including, but not limited to, in person, by telephone, text message, Facebook, MySpace, Twitter, email or mail) with the professional sports team on your behalf.<sup>58</sup>

The effect of these statements, of course, is to close the gap between attor-

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54. *Id.* at 3.

55. *See, e.g., infra* note 126.

56. NCAA Informational Memo, *supra* note 53, at 3.

57. The former is highlighted in the NCAA Bylaws, *supra* note 9, § 12.02.1, which focuses on representation of a student-athlete “for the purpose of marketing his or her athletics ability or reputation for financial gain.” Note as well that the new definition of “agent” in the NCAA Manual reaches even one who “indirectly . . . attempts” to market a student-athlete. *Id.* As for negotiations, the NCAA’s informational memo highlights the following statement: “Under NCAA regulations, you and your parents are permitted to receive advice from a lawyer or other individual concerning a proposed professional contract, provided the advisor does not represent you directly in negotiations for the contract.” NCAA Informational Memo, *supra* note 53, at 3 (underlined in original).

58. NCAA Informational Memo, *supra* note 53, at 3 (underlined in original).



ney representatives and non-attorney advisors. The actual legislation (NCAA Bylaw 12.3.2) prohibits only *lawyers* from having “direct contact” with a professional organization on a student-athlete’s behalf, being “present” during contract negotiations, or representing a student-athlete in “negotiations” for a contract. But with its non-legislated interpretation, the NCAA effectively imposes the same restrictions on non-lawyer representatives, who cannot be present during contract negotiations or have “any direct contact” with an MLB club on a student-athlete’s behalf.<sup>59</sup> Presumably the lack of direct contact also prohibits any contract “negotiations.”

The trap is set. Non-attorney representatives and their clients believe they have steered clear of problems with NCAA Bylaw 12.3.2 because no lawyer is involved. They know the representatives cannot engage in activities associated with agents—marketing a student-athlete and negotiating on his behalf—because those restrictions also are set forth in NCAA legislation. If they are not aware of the NCAA’s broader interpretation, however, they do *not* know the representatives are prohibited from having *any contact* with MLB clubs on behalf of a client, or being present during contract negotiations even if they do not actively engage in those negotiations. Yet as recent cases have shown,<sup>60</sup> even the slightest contact between an MLB club and an “advisor” has the potential for implicating the no-agent rule.

The trap is not set on purpose. I was involved for many years with infractions cases processed by individuals in the NCAA’s home office, particularly those individuals charged with enforcement of NCAA rules. I know them to be competent staff members whose actions, overwhelmingly, are taken in good faith, and I have the utmost respect for the difficult jobs they have. Yet it seems problematic to build no-agent cases on *interpreta-*

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59. Indeed, prohibited contact by advisors is even broader than the prohibited contact for attorneys because the former includes contact by text message, Facebook, MySpace, Twitter, and email—all missing from NCAA Bylaw 12.3.2. Presumably the bylaw will soon catch up in terms of social media. In the meantime, it seems odd in this age that the NCAA would try to cover all social media bases with a list. Does that mean contact by Instagram, LinkedIn, Tumblr, or some other social media platform would be OK? Presumably restrictions on all social media contacts would be a better approach.

60. See, e.g., *infra* text accompanying notes 124–26. In addition to the Wetzler case discussed later in this article, the NCAA’s student-athlete reinstatement staff has decided other cases in recent years, and imposed withholding penalties, based on agent-advisor contact with MLB clubs. Unlike public infractions reports issued by the Committee on Infractions, however, student-athlete reinstatement case reports are not made publicly available. Thus, they are not accessible on the [ncaa.org](http://ncaa.org) website except to designated employees at member institutions who possess a password. See Chris Low, *NCAA Exec: Athletes’ “Welfare” Is Priority*, ESPN (Dec. 6, 2010), <http://sports.espn.go.com/ncaa/news/story?id=5892059> (interviewing former NCAA Vice President of Enforcement Julie Roe Lach, who explains that federal law on student privacy prevents public reports on student-athlete reinstatement). Student-athlete reinstatement reports are on file with the author.

tions of rules—interpretations that may be unknown to the student-athletes and advisors they affect.

The fact that these cases continue<sup>61</sup> is an indication of one of two scenarios: either (1) agent-advisors (and perhaps their clients) are knowingly violating the rules, or (2) they are unwittingly tripped up by a misunderstanding of what is allowed and disallowed. I have no doubt that some advisors (and some clients) fall into the former category. Much of the NCAA's legislative focus in recent years has been on curtailing the activities of unscrupulous agents,<sup>62</sup> and I well know from my infractions experience that inter-collegiate athletics participants often knowingly violate the rules as well. Nonetheless, the NCAA should take every step possible to ensure that those who try, in good faith, to stay on the right side of the rules know *all* of "the rules" under which they are expected to operate.

The NCAA, of course, has little direct control over the actions of agent-advisors who operate outside its member institutions. Whether those agent-advisors know the extent of the NCAA's rule interpretations is unknown.<sup>63</sup> But hopefully those individuals are paying attention when stories surface of student-athletes rendered ineligible because of their dealings with agents. Certainly it would seem to be in the best interests of the agent-advisors, at least in the long term, to comply with the NCAA's expectations; their business would not be sustainable if their clients regularly ran into difficulties with NCAA eligibility.

For several years, the NCAA has attempted to reach out to member institutions and draft-eligible student-athletes. Each spring, the NCAA sends a memorandum to college juniors with "Information Regarding the . . . Major League Baseball (MLB) First-Year Player Draft, Agents and Tryouts."<sup>64</sup> The timing of this memo, however, creates significant issues. The individuals the memo is intended to reach are deep in the middle of their playing seasons.<sup>65</sup> Whether the information even reaches those student-athletes is questionable, and of course it does not reach *high-school* draft prospects.

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61. Alan Scher Zagier, *College Baseball Reconsiders Murky Rule on Agents*, USA TODAY (Apr. 6, 2011), [http://usatoday30.usatoday.com/sports/college/baseball/2011-04-06-2240467668\\_x.htm](http://usatoday30.usatoday.com/sports/college/baseball/2011-04-06-2240467668_x.htm).

62. See Karcher, *supra* note 2, at 215.

63. As noted previously, the NCAA's informational memo setting forth guidance on the MLB draft process and student-athletes' use of agent-advisors is available on the NCAA website, at least with a little hunting. Final decisions of the student-athlete reinstatement staff, on the other hand, are made available to employees of NCAA institutions with NCAA accounts and passwords, but they typically are not available directly on the NCAA website to other members of the public.

64. See NCAA Informational Memo, *supra* note 53 and accompanying text.

65. The 2014 memo was released in March, but in earlier years the memo had not been released until considerably later. The 2013 memo, for example, was dated June 11, after most student-athletes were already out of school for the summer. See *infra* notes 128–30 and accompanying text.

The information also is available on the NCAA website, but it is not particularly easy to locate, and it takes both knowledge of its existence and an affirmative, concerted effort for an interested individual to find the information. In contrast, the actual *rules* (the bylaws, which implicitly give greater leeway to non-lawyer advisors) are readily accessible and perhaps reasonably, but erroneously, considered to be comprehensive in their regulation of agents.

In summary, then, representatives of baseball student-athletes can be lawyers, “agents,” or “advisors”—and each individual can wear multiple hats. MLB draftees (or prospective draftees) can hire an agent to assist them in negotiations with MLB clubs, but as soon as they do, strict NCAA no-agent rules make such student-athletes ineligible for further intercollegiate competition. Student-athletes can hire an “advisor,” but under NCAA bylaws, that individual will be deemed an impermissible “agent” if the individual “markets” a student-athlete’s athletics ability or reputation to MLB clubs or engages on the student-athlete’s behalf in negotiations for a professional contract. Agents or advisors can be lawyers, but in addressing lawyers, NCAA legislation goes beyond marketing and negotiating: a *lawyer* representative of a student-athlete cannot be *present* during contract negotiations with an MLB club, nor can the lawyer have “any *direct contact*” with an MLB club on the student-athlete’s behalf.

This legislative scheme thus distinguishes between lawyer representatives and non-lawyer representatives. The latter seemingly have more latitude to engage with MLB clubs on a student-athlete’s behalf, provided they do not “market” their client or directly “negotiate” for their client. However, a non-legislated NCAA *interpretation* of the bylaws prohibits even non-lawyer advisors from having “direct contact” with an MLB club regarding their clients or being “present” during discussions of a contract offer. This interpretation effectively negates the legislative distinction between lawyer and non-lawyer representatives.

Non-agent advisors (whether attorneys or not) can still serve their clients, but must do so behind the scenes, with student-athletes relaying information from MLB clubs to their advisors and presumably implementing their advisors’ advice in their communications back to MLB clubs. If student-athletes seek to preserve intercollegiate eligibility, they cannot risk allowing any direct communication or contact between advisors and MLB clubs. Not only does this enforcement scheme hamper student-athletes’ negotiating abilities, but it also results in numerous practical problems, which are the focus of the next section of this article.

### B. Practical Problems with Rules Enforcement

Practical problems with the enforcement of no-agent rules begin with the ubiquity of student-athlete use of advisors—the vast majority of draft prospects have one. MLB representatives have been candid about the extent to

which they deal with advisors. One former MLB executive told a *New York Times* reporter in 2010 that it was “standard practice” to discuss professional contracts with student-athletes’ advisors: “You’re not dealing with the kid.”<sup>66</sup> Because the use of advisors is so common, the NCAA opens itself up to charges of selective enforcement virtually anytime it pursues a no-agent case that happens to come to its attention.

Student-athlete use of advisors, of course, is understandable. Young ballplayers in the draft process are expected to make life-altering decisions, and they are naturally inclined to seek the aid of someone familiar with the world of big-business baseball.<sup>67</sup> The NCAA recognizes that need . . . to a point. In its guidance to draft prospects, the NCAA attempts to answer the question “*Do I need an advisor?*”<sup>68</sup> with the following:

The answer to this question is not an easy yes or no. You will likely receive many different opinions on this subject depending on who you ask. It is permissible for you to use an advisor to provide advice regarding the draft and/or a professional contract offer, as long as your advisor acts in accordance with the NCAA legislation summarized in this memorandum. . . . You do not need to have an advisor to be recognized or drafted by a MLB club. MLB and its clubs employ numerous scouts, and with 50 rounds of selections, their teams can discover the talents of potential draftees without the assistance of advisors.<sup>69</sup>

This advice appears to reflect the NCAA’s grudging acceptance of reality: we know student-athletes will engage agents or advisors on the advice of others, but the risk of using one likely outweighs the potential benefit—particularly when the restrictions on advisors are severe:

You cannot allow an agent or advisor to have conversations with MLB clubs on your behalf. This means that an agent or advisor cannot discuss your draft status with any club. An agent or advisor cannot discuss your signability or contract status with any club. An agent or advisor cannot arrange tryouts for you with any club.<sup>70</sup>

The NCAA notes that MLB contracts for first-year players “may include: (1) Signing bonus; (2) Scholarship money; (3) Incentive bonus plan;

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66. Borzi, *supra* note 32; *see also* Thomas, *supra* note 7 (quoting another anonymous MLB executive as saying “[v]irtually every player has an agent”).

67. Karcher, *supra* note 2, at 221–22, 225 (describing the “big business” aspects of the MLB draft process). Karcher played professional baseball in the Atlanta Braves organization. *Id.* at 225.

68. NCAA Informational Memo, *supra* note 53, at 4 (italics in original).

69. *Id.*

70. *Id.*

(4) Invitations to MLB camps; and (5) MLB starting level.”<sup>71</sup> Some of those terms, in the NCAA’s judgment, can be negotiated by student-athletes and their families without the help of an advisor: “Through your own research, you can learn about scholarship money and the bonus plan and you may also be able to locate past MLB Draft signing bonus numbers to make your own comparison of the offer you receive.”<sup>72</sup>

With signing bonuses ranging up to the millions of dollars,<sup>73</sup> it seems naïve, or worse, for the NCAA to encourage student-athletes to negotiate the terrain of MLB contracts without the assistance of an advisor. In the face of regular criticism of its no-agent rules, the NCAA may be reconsidering its stance. In 2011, Dennis Poppe, at the time the NCAA’s managing director for baseball, suggested that new rules in tune with baseball’s “unique set of circumstances” might be in the works.<sup>74</sup> To date, though, such changes have not come to pass.

To be fair, the NCAA does permit the use of an advisor, “as long as [the] advisor acts in accordance with. . .NCAA legislation.”<sup>75</sup> That’s partly true; the NCAA *legislation* consists of the bylaws in the Division I Manual, but as noted above, the NCAA has added another layer of constraints in more informal *interpretations* of those bylaws.<sup>76</sup> So student-athletes and their advisors must be aware of both the NCAA bylaws and the NCAA’s interpretations of those bylaws in order to stay on the sunny side of the no-agent rules.

For example, it is critical that student-athletes, their families, and potential advisors have knowledge of the NCAA directive—from a bylaw *interpretation*—that an advisor, whether attorney or not, “may not be *present* during the discussions of a contract offer with a professional team.”<sup>77</sup> Knowledge of that one straightforward rule can help to avoid difficulties for student-athletes who, in reliance on a bylaw focusing solely on attorneys, may unwittingly seek to have non-attorney advisors accompany them to contract discussions with representatives of an MLB club.

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71. *Id.*

72. *Id.*

73. See Karcher, *supra* note 2, at 220–21 (listing signing bonuses of top draftees from 1989–2004 and noting that even a third-rounder in the 2004 draft received a bonus of \$2.29 million).

74. Zagier, *supra* note 61 (quoting Poppe’s observation that “[i]f I had a kid who was left-handed and threw 95 (mph), I’d like to know what his value would be”). Poppe retired in January 2014; in June 2014, the “Dennis Poppe Plaza” outside TD America Park, home of the College World Series in Omaha, was named in his honor. Eric Olson, *CWS Stadium Plaza Named in Honor of Retired NCAA Official Dennis Poppe*, NCAA.COM (June 6, 2014), <http://www.ncaa.com/news/baseball/article/2014-06-06/cws-stadium-plaza-named-honor-retired-ncaa-official-dennis-poppe>.

75. See *supra* text accompanying note 69.

76. See *supra* text accompanying notes 58–59.

77. NCAA Informational Memo, *supra* note 53, at 3 (emphasis added).

Even if student-athletes are aware of all relevant NCAA rules, enforcement of those rules remains difficult because of the inherent ambiguity of relevant terms. For example, the same interpretation quoted above forbids advisors from having “*any direct contact . . . with the professional sports team on [the student-athlete’s] behalf.*”<sup>78</sup> But what kind of contact is “on the behalf” of a student-athlete? Does a simple voice or text message between an advisor and an MLB representative—“Hi, this is Joe Smith. Just wanted to introduce myself. I understand you’ve been scouting John Johnson, and thought I’d let you know I’m his advisor.”—constitute a violation? Does contact “on behalf of” a student-athlete imply some type of “marketing” of a student-athlete’s athletics ability or reputation, and does an introductory contact such as the one above constitute “marketing”?

What constitutes “indirect” contact? And does it matter who *initiates* the contact? The rules appear to forbid any direct contact between advisor and MLB club representative, but as a practical matter, that could give significant leverage to an MLB club seeking to manipulate the rules to its advantage. For example, what would stop an MLB club from initiating direct contact with the advisor of one of its draftees, thus rendering the draftee ineligible to compete at the intercollegiate level, and then using that presumed ineligibility as an inducement for the student-athlete to sign a professional contract, perhaps with terms favorable to the club?

One can see that the bylaws and their interpretations give the NCAA’s rules-enforcement staff immense latitude in deciding whether to pursue alleged no-agent violations. That latitude is enhanced by the expanded definition of “agent” that the NCAA adopted in 2012, which includes “any individual who, directly or indirectly . . . [s]eeks to obtain any type of financial gain or benefit . . . from a student-athlete’s potential earnings as a professional athlete.”<sup>79</sup> That definition, again depending on how NCAA representatives interpret it, seemingly could embrace virtually every advisor. What advisor is *not* in the business of seeking, at least indirectly, some financial benefit from the client’s potential professional career?

The process by which no-agent violations are determined also insulates NCAA decisions from meaningful review, which may encourage NCAA staffers to interpret the rules broadly. In a standard infractions case, the NCAA enforcement staff investigates an alleged rules violation, determines whether it is likely that a violation occurred, and then presents its case before the Committee on Infractions.<sup>80</sup> The Committee ultimately determines whether the evidence supports a finding of a violation.<sup>81</sup> No-agent cases,

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78. *Id.* (emphasis added).

79. NCAA Bylaws, *supra* note 9, § 12.02.1-(b).

80. See Jerry R. Parkinson, *Scoundrels: An Inside Look at the NCAA Infractions and Enforcement Processes*, 12 WYO. L. REV. 215, 225–27 (2012).

81. *Id.* at 227.

however, rarely go through that process because student-athlete eligibility is the central issue, and eligibility matters are resolved by a separate student-athlete reinstatement staff.<sup>82</sup>

In a no-agent case, the NCAA enforcement staff, after investigating and determining that a violation likely occurred, presents its evidence to the institution for which the student-athlete competes. The institution then is expected to declare the student-athlete ineligible and seek *reinstatement* through a student-athlete reinstatement process.<sup>83</sup> Typically a reinstatement—granted by NCAA staff without a formal finding of a violation by the infractions committee—carries with it a withholding of the student-athlete from competition, sometimes permanently, but more typically for part or all of a season.

Schools seldom contest the enforcement staff's determination that a violation occurred because challenging that determination—and allowing the student-athlete to continue competing—exposes the institution to further sanctions if the challenge is unsuccessful.<sup>84</sup> Moreover, challenges take time, and, if the case is being processed either shortly before or during the playing season, the interests of both the institution and the student-athlete may be best served by getting the student-athlete back on the field as soon as possible. In that scenario, institutions often will be inclined to bite the bullet, declare the student-athlete ineligible (even if there is doubt about a violation), and seek reinstatement as soon as possible. It serves little purpose, for example, to spend even a couple of weeks at the beginning of a season challenging a no-agent violation if the likely result of the reinstatement process is a modest withholding of the student-athlete from competition.

The institutional incentive to declare a student-athlete ineligible and seek reinstatement highlights an inherent conflict-of-interest problem: the student-athlete's interests may differ from the interests of the other participants in the process—the student-athlete's institution, MLB clubs, and even the student-athlete's own advisor. In their enforcement of no-agent rules, NCAA staffers must consider that these other participants may manipulate the process to the detriment of the student-athlete.

A student-athlete, for example, may believe that he has committed no violation, but rather than challenge the NCAA's case against him, he may

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82. *Behind the Blue Disk, Student-Athlete Reinstatement: How It Works*, NCAA (Oct. 21, 2009), available at [http://www.ncaa.org/sites/default/files/SAR%2BBlue%2BDisk%2B\(web%2Bone\).pdf](http://www.ncaa.org/sites/default/files/SAR%2BBlue%2BDisk%2B(web%2Bone).pdf) [hereinafter NCAA Student-Athlete Reinstatement Summary].

83. *Id.*

84. If the school allows a student-athlete to compete, but after the challenge, the student-athlete ultimately is determined to have committed a no-agent violation, the school effectively has allowed competition by an ineligible student-athlete and is subject at least to a vacation of contests in which the student-athlete competed.

defer to his institution's decision to withhold him from competition—a decision heavily influenced by the threat of sanctions, should the program compete with an ineligible player. Another example arises from a provision in the NCAA bylaws that allows an institution to create a “professional sports counseling panel” to assist its student-athletes in negotiating with MLB clubs.<sup>85</sup> The bylaws specifically allow such a panel to “enter into negotiations with a professional sports organization” on behalf of a student-athlete without jeopardizing the student-athlete's eligibility.<sup>86</sup> But as one commentator (and former major leaguer) has noted, that arrangement creates “an inherent conflict of interest . . .—the school may have an interest in having its players play for the school another year instead of becoming a professional.”<sup>87</sup>

Potential conflicts of interest between the student-athlete and MLB clubs are readily apparent. Not only does each party in contract negotiations seek to secure terms favorable to its position, but MLB clubs' interest even in signing their draftees could run counter to a student-athlete's interest in competing (or continuing to compete) in college. In one recent example, an MLB club was alleged to have retaliated against draftees who decided to return to their institutions to compete in their senior year. The retaliation allegedly took the form of “turning in” the student-athletes to the NCAA for violations of the no-agent rules, despite the club's willingness to engage with (that is, to have “direct contact” with) the student-athletes' advisors during the draft process.<sup>88</sup>

Similar scenarios can arise in the relationship between student-athletes and their advisors. Because most of those advisors presumably are interested in a longer-term relationship with their clients that will continue to compensate them as the clients become professionals, they may have interests that differ from the interests of their clients. An advisor, for example, may wish to strike while the iron is hot and encourage a student-athlete client to sign a professional contract rather than to enter (or return to) college. Similarly, they may be inclined to reach out to MLB representatives, in violation of NCAA no-contact rules, unbeknownst to their clients.<sup>89</sup>

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85. NCAA Bylaws, *supra* note 9, § 12.3.4.

86. *Id.* § 12.2.4.3. The bylaw specifically provides that the panel may engage in negotiations “without the loss of the [student-athlete's] amateur status.” *Id.*

87. Karcher, *supra* note 2, at 224. Karcher played three seasons as a first baseman for the Atlanta Braves. *Id.* at 225.

88. *See infra* text accompanying notes 106–109.

89. The NCAA's 2014 informational memo states that agent-advisor contact with an MLB club is a violation regardless of whether the contact was made “independently or per [the student-athlete's] request or direction.” NCAA Informational Memo, *supra* note 53, at 3. That is new language in the memo; the 2013 memo did not include such language. Memorandum from Rachel Newman Baker, Managing Director of Enforcement, and Kris Richardson, Director of Academic and Membership Affairs, to Division I Baseball Student-Athletes with Remaining Eligibility (June 11, 2013) (on file with author) [hereinafter NCAA 2013 Informational Memo]. The message to student-



The *Oliver* case illustrates what can happen if the advisor-client relationship turns sour. Recall that Oliver, according to the NCAA, violated the no-agent rule when one of his attorney-advisors was present during a meeting with the Minnesota Twins to discuss a contract offer.<sup>90</sup> The case opinion reports that the attorney attended the meeting, held in the Oliver home, at the attorney's "own request"<sup>91</sup>—despite the fact that NCAA Bylaw 12.3.2.1 specifically prohibited lawyers from being present during discussions of a contract offer.<sup>92</sup> Even at this stage, the attorney may have been acting in his own interests rather than in the interests of his client, who may not have wanted the attorney present.<sup>93</sup>

What happened subsequent to the meeting is even more troubling. Over a year and a half later, in March 2008, Oliver decided to terminate his relationship with his attorney-advisors and retain the Boras Corporation instead.<sup>94</sup> Two months later, presumably miffed at this turn of events, Oliver's former attorneys notified the NCAA (by regular mail, fax, and email) of the NCAA violation that they had caused in 2006.<sup>95</sup> That same month, Oliver's school, Oklahoma State University, suspended him indefinitely from the baseball team.<sup>96</sup>

Oliver's case is a cautionary tale for student-athletes considering the retention of an advisor to represent them in their dealings with MLB clubs. But at least the violation in the *Oliver* case easily could have been avoided—the no-attorney-presence bylaw was (and remains) clear. More problematic are situations in which student-athletes attempt in good faith to comply with the rules, but get tripped up because they are not aware of NCAA interpretations of rules, or because of the inherent ambiguity of the rules related to non-attorney advisors. The next section provides an illus-

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athletes, then, is clear: it really does not matter to the NCAA whether one's agent-advisor has contact with an MLB club without the student-athlete's knowledge; it is still a violation.

90. *Oliver v. Nat'l Collegiate Athletic Ass'n*, 155 Ohio Misc. 2d 17, 22–23 (Com. Pl. 2009).

91. *Id.*

92. *Id.* at 30.

93. The opinion does not indicate whether either Oliver or the attorney was aware of the NCAA prohibition.

94. *Oliver*, 155 Ohio Misc. 2d at 23. The Boras Corporation is owned by Scott Boras, a "super-agent" who has represented many of the top MLB players. The 10-year, \$252 million contract he negotiated for Alex Rodriguez with the Texas Rangers in December 2000 was by far the richest in professional sports history. Henry Schulman & John Shea, *\$252 MILLION MAN / Rodriguez Signs with Rangers; Contract Doubles Previous Richest*, S.F. CHRON. (Dec. 12, 2000), <http://www.sfgate.com/sports/article/252-MILLION-MAN-Rodriguez-signs-with-Rangers-3238243.php>.

95. *Oliver*, 155 Ohio Misc. 2d at 23.

96. *Id.*

tration of such a case.

### C. The Wetzler Case: Anatomy of a No-Agent Violation

One commentator has called the Wetzler case “[t]he first major application of the No-Agent Rule by the NCAA since Andy Oliver.”<sup>97</sup> While the NCAA has enforced its no-agent rules in numerous other cases since *Oliver*, the Wetzler case probably generated more heat and attention because of the role played by another participant in the MLB draft process. Recall that in *Oliver*, a disgruntled agent-advisor reported a violation to the NCAA. The Wetzler case was facilitated, if not initiated, by a spurned MLB club.<sup>98</sup>

Ben Wetzler was a promising pitcher coming out of high school in 2010 in Clackamas, Oregon.<sup>99</sup> A left-hander, he drew enough attention to be drafted in the 15<sup>th</sup> round of the 2010 MLB First-Year Player Draft by the Cleveland Indians.<sup>100</sup> Wetzler had his heart set, however, on pitching for Oregon State University, which had won back-to-back national championships in 2006-07.<sup>101</sup> He had considerable success in college, garnering first-team all-PAC-12 honors and helping his team earn a bid to the College World Series in his junior year.<sup>102</sup>

As a result, in June 2013, at the end of Wetzler’s junior year, he was drafted in the fifth round of the First-Year Player Draft by the Philadelphia Phillies and offered “a signing bonus in the neighborhood of \$350,000.”<sup>103</sup>

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97. Darren Heitner, *Why the Philadelphia Phillies and NCAA Deserve Your Scorn*, FORBES (Feb. 23, 2014), <http://www.forbes.com/sites/darrenheitner/2014/02/23/why-the-philadelphia-phillies-and-ncaa-deserve-your-scorn>.

98. In the spirit of full disclosure, I represented Mr. Wetzler in reinstatement proceedings before the NCAA. I do not represent him, and have not represented him, in dealings with any MLB organization. This account is based solely on published newspaper reports and does not disclose any communications between Mr. Wetzler and myself, or any confidential information revealed in the NCAA investigation or reinstatement proceedings.

99. 2014 OREGON STATE BASEBALL MEDIA GUIDE, OR. ST. U., at 46 (Jan. 26, 2014), available at [http://www.osubeavers.com/pdf9/2619546.pdf?SPSID=750183&SPID=127157&DB\\_OEM\\_ID=30800](http://www.osubeavers.com/pdf9/2619546.pdf?SPSID=750183&SPID=127157&DB_OEM_ID=30800).

100. *Id.* at 45. Wetzler was named the top high school player in Oregon by *Baseball Northwest* and garnered both Gatorade and Louisville Slugger Player of the Year honors. His high school win-loss record was 28-3. *Id.* at 46.

101. *Id.* at 45.

102. *Id.*

103. Kerry Eggers, *Phillies, NCAA Are the Bad Guys – Not Ben Wetzler*, PORTLAND TRIB. (Feb. 21, 2014), <http://portlandtribune.com/pt/12-sports/211798-69615-eggers-phillies-ncaa-are-the-bad-guys-not-ben-wetzler>; Connor Letourneau, *Oregon State Baseball: NCAA Ruling on Ben Wetzler Feeds National Debate on “No Agent” Rule*, OREGONIAN (Feb. 21, 2014), [http://www.oregonlive.com/beavers/index.ssf/2014/02/oregon\\_state\\_baseball\\_wetzler.html](http://www.oregonlive.com/beavers/index.ssf/2014/02/oregon_state_baseball_wetzler.html) (Phillies’ offer “reportedly included a signing bonus of about \$350,000”).

Intent on helping his OSU teammates return to Omaha (home of the College World Series), Wetzler turned down the Phillies' offer and returned to Oregon State to complete his college degree and compete for the Beavers in his senior year.

Wetzler's plan began to unravel in November 2013, when he and Oregon State officials learned that the NCAA was investigating Wetzler for an alleged violation of the no-agent rules during the draft process earlier that year.<sup>104</sup> Ultimately, on February 21, 2014, the NCAA issued a public statement announcing that Wetzler was suspended for 11 games (20% of the season) "due to his involvement with an agent during the 2013 Major League Baseball draft."<sup>105</sup>

By the time of the NCAA announcement, the case already had generated some notoriety. The investigation had become public when Wetzler did not compete for his team at the beginning of the season<sup>106</sup>; soon after, it was reported that representatives of the Philadelphia Phillies had told the NCAA enforcement staff that Wetzler had used an agent during the contract negotiation process that accompanied the 2013 draft. Aaron Fitt, a writer for *Baseball America*, first disclosed on February 20, 2014 that "[s]everal sources have confirmed . . . that the Phillies . . . told the NCAA in November that Wetzler violated the NCAA's 'no-agent' rule."<sup>107</sup> The Phillies initially had no comment, but after the NCAA reported Wetzler's suspension, the Phillies organization issued the following statement: "The Phillies did participate in the NCAA investigation and a ruling has been issued. We believe it is inappropriate to comment further on either the negotiation with the player or the action taken by the NCAA."<sup>108</sup>

The reaction to the Phillies' involvement, from commentators around the country, was immediate and harsh, particularly after it was reported that the

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104. Seth Prince, *NCAA Rules Ben Wetzler Will Miss 20 Percent of Season; Oregon State Calls Penalty "Too Harsh,"* OREGONIAN (Feb. 21, 2014), [http://www.oregonlive.com/beavers/index.ssf/2014/02/ncaa\\_rules\\_ben\\_wetzler\\_will\\_20.html](http://www.oregonlive.com/beavers/index.ssf/2014/02/ncaa_rules_ben_wetzler_will_20.html) (quoting press release from Oregon State University noting that "[t]he NCAA notified OSU in late November 2013 of its intent to conduct an investigation involving Wetzler").

105. NCAA Press Release, *Oregon State's Ben Wetzler Eligible to Play on March 2* (Feb. 21, 2014), <http://www.ncaa.org/about/resources/media-center/press-releases/oregon-states-ben-wetzler-eligible-play-march-2>.

106. See Letourneau, *supra* note 103 (noting that Wetzler did not travel with the team on its season-opening road trips and was likely to miss his third start before becoming eligible on March 2).

107. Aaron Fitt, *Phillies Accused Ben Wetzler of NCAA Rules Violations*, BASEBALL AMERICA (Feb. 20, 2014), <http://www.baseballamerica.com/college/phillies-accused-ben-wetzler-of-ncaa-rules-violations/>.

108. Aaron Fitt, *Oregon State's Ben Wetzler Suspended 11 Games by NCAA*, BASEBALL AMERICA (Feb. 22, 2014), <http://www.baseballamerica.com/college/oregon-states-ben-wetzler-suspended-11-games-by-NCAA/>.

Phillies also had reported a similar violation by their sixth-round draft pick, Jason Monda of Washington State University, whom the Phillies also were unsuccessful in signing to a professional contract.<sup>109</sup> A *Forbes* writer called the Phillies' actions "downright deplorable . . . and preposterous."<sup>110</sup> A baseball writer from *CBS Sports* suggested that the Phillies' actions would come back to haunt them:

[N]ow that word has gotten out that the Phillies turned in Wetzler, they potentially have a very serious problem themselves. . . . [I]t's hard to imagine being a highly-touted collegiate junior and seeing upside in being drafted by the Phillies as opposed to 29 other teams who haven't turned in a kid and cost him 20 percent of his senior year.<sup>111</sup>

Fitt, of *Baseball America*, even suggested that the Phillies would be shut out of future negotiations involving some agents' clients. He quoted an unnamed agent "who advises numerous high-profile prospects" as saying, in response to the Phillies' actions,

As of today, the Phillies are out. If the Phillies call for an in-home visit, the Phillies are not getting into any more of our households. We're going to shut down all communication with the Phillies—no questionnaires returned, no communications with the Phillies' scouts about when players are going to pitch and no communication about signability information. You can't have this adversarial relationship between teams and players, and then have them be able to hold that over the players: "You'd better take this deal or I'm going to turn you in."<sup>112</sup>

The reason for all the criticism, of course, is that virtually all MLB draftees use agent-advisors, and MLB clubs willingly work with those advisors during the draft process. To quote Fitt again, "Major league scouting directors have often told [*Baseball America*] that they prefer dealing directly with agents, who know the ins and outs of the draft process. That is the industry norm for baseball . . . ."<sup>113</sup> Therefore, for an MLB club to report a student-

109. *Id.* See also Mark Townsend, *NCAA Suspends Oregon State Pitcher Ben Wetzler for 20 Percent of the Season, Phillies Issue Statement*, YAHOO SPORTS (Feb. 22, 2014), <http://sports.yahoo.com/blogs/big-league-stew/ncaa-suspends-oregon-state-pitcher-ben-wetzler-20-171448138-mlb.html>; Matt Gelb, *Ben Wetzler Suspended 11 Games; Oregon State "Disappointed" in Phillies*, PHIL. INQUIRER (Feb. 22, 2014), <http://www.philly.com/philly/blogs/sports/phillies/Ben-Wetzler-suspended-11-games-Oregon-State-disappointed-in-Phillies.html>; Heitner, *supra* note 97.

110. Heitner, *supra* note 97.

111. Matt Snyder, *Ben Wetzler Suspended for 20 Percent of Oregon State's Season*, CBS SPORTS (Feb. 21, 2014), <http://www.cbssports.com/mlb/eye-on-baseball/24451662/ben-wetzler-suspended-for-20-percent-of-oregon-states-season>.

112. Fitt, *supra* note 108.

113. *Id.* See also Townsend, *supra* note 109 ("[I]t's understood around the league

athlete to the NCAA for violating the no-agent rules—after the student-athlete decides not to sign a contract with the club—seems either vindictive or retaliatory, or both. And it rarely occurs: *Baseball America* reported that before the Wetzler case, “the last known case of a big league team directly reporting a violation to the NCAA was in 1992, when the White Sox turned in A.J. Hinch.”<sup>114</sup>

To be fair, the Phillies may not have sought out the NCAA to turn in Wetzler. While its statements on the matter are cryptic,<sup>115</sup> the Phillies may have simply responded truthfully to inquiries by the NCAA. A very small number of top-ten-round draftees each year fail to sign a professional contract and return to school.<sup>116</sup> Thus, it would not require much effort on the part of the NCAA enforcement staff to seek out information related to each of those players, including whether any given player had been represented by an advisor and what the nature of the advisor’s involvement in contract negotiations had been.<sup>117</sup>

Regardless of who initiated the discussions between the Phillies and the NCAA, the Wetzler case highlights a significant problem in the development of a no-agent infractions case. As *Baseball America*’s Fitt puts it, “the only players who get punished for violating the ‘no agent’ rule are those who are turned in by a scorned former agent, or a major league team that failed to sign its draftee.”<sup>118</sup> And MLB clubs are under considerable pressure to sign draftees because of a collectively bargained “slotting system that predetermines the assigned value to particular draft pick numbers . . . . When a team does not sign a player selected, the team . . . forfeits the value assigned to that particular slot.”<sup>119</sup> In other words, the club loses

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that involving an agent/advisor is a necessary and now standard procedure, regardless of the NCAA rule. MLB teams simply don’t squeal . . . .”).

114. Fitt, *supra* note 108.

115. See *supra* text accompanying note 108 (“The Phillies did participate in the NCAA investigation . . . .”); Heitner, *supra* note 97 (stating that Phillies general manager Ruben Amaro Jr. “admitted that he was aware when his club decided to report Wetzler to the NCAA”).

116. Fitt, *supra* note 108; Heitner, *supra* note 97.

117. The Phillies’ scouting director, in an interview with Philadelphia’s Daily News in May 2014, stated that the Phillies simply responded to requests for information from the NCAA: “We gave them the information they asked for and let them do their job.” David Murphy, *Phillies Scouting Director Marti Wolever Discusses NCAA, Ben Wetzler Suspension*, (PHIL.) DAILY NEWS (May 29, 2014), <http://www.philly.com/philly/blogs/phillies/Phillies-scouting-director-Marti-Wolever-discusses-NCAA-Ben-Wetzler-suspension.html>.

118. Fitt, *supra* note 108.

119. Heitner, *supra* note 97. Heitner quotes Rick Johnson, the attorney who represented Andy Oliver in his case against the NCAA: “No teams can afford not to have players signed under [the] new hard slotting draft system. On a macroeconomic scale, all MLB teams are probably secretly saying this [the Phillies turning in Wetzler] is great, because in future drafts, players are worried that teams will tattle on them. This is the first time that I’m aware of that a team has done this, but keep in mind that this is

money that it could have used to help sign other draftees.

The pressures on MLB clubs—and the hard feelings that can accompany the failure to sign a draftee—are apparent from the comments of the Phillies’ scouting director. In discussing the club’s failure to sign both Wetzler and Monda, and the Phillies’ cooperation in the NCAA’s subsequent cases against both student-athletes, scouting director Marti Wolever said the following:

The NCAA did the investigation, not the Philadelphia Phillies. That’s one. Two, as I said before, the only regret I have is taking players who wouldn’t sign and had no intentions of signing. We were led to believe, prior to the draft, that both of these gentlemen, according to their agents, would sign. Subsequently, that’s why we took them. We offered what we offered and both accepted and then decided against it after that. Again, my only regret is we could have taken other players who would be in this organization. There’s no compensation and with the new rules the way they are, guess what guys? You can’t use that money. I can’t use it in the back half to sign Jarred Cosart or Jonathan Singleton or any of those kids. I can’t use that money. So all I ask for is for people to be honest and upfront. It’s very plain and simple. If you don’t want to sign, tell us. If you do, let’s try to reach an agreement and let’s move forward. Plain and simple.<sup>120</sup>

“Plain and simple,” perhaps, for MLB clubs, but clearly not so plain and simple for student-athletes like Ben Wetzler, who are dealing with scouts, advisors, and the MLB draft process at the same time they are trying to concentrate on their academics and playing seasons. A host of reasons could influence—and alter—a young ballplayer’s initial inclination to go pro. In Wetzler’s case, he made it clear that the experience of playing in the College World Series with his Oregon State teammates at the end of his junior year led to his desire to return to school. He wanted to be “on the bottom of that dog pile” when his team won the national championship his senior year.<sup>121</sup> In many respects, that is the type of student-athlete the NCAA should applaud, particularly if he is also motivated by the desire to

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based on the first year of hard-slotting. So you’ve got a whole different dynamic that’s going on in baseball. If a kid doesn’t sign it costs them money. So they’re going to make someone pay for that. What happens to the signing scout when he doesn’t bring home the bacon?”

120. Murphy, *supra* note 117.

121. Connor Letourneau, *Oregon State Baseball: Ben Wetzler Enters Senior Season Eager to Join the Dog Pile*, OREGONIAN (Feb. 14, 2014), [http://www.oregonlive.com/beavers/index.ssf/2014/02/oregon\\_state\\_baseball\\_ben\\_wetzler.html](http://www.oregonlive.com/beavers/index.ssf/2014/02/oregon_state_baseball_ben_wetzler.html) (quoting Wetzler).

complete his college education.<sup>122</sup>

Wolever's contempt for young ballplayers who "break their promises"<sup>123</sup> is evident in the remarks quoted above. That kind of contempt and anger over the failure to sign a draftee could lead an MLB club not only to turn in a student-athlete to the NCAA, but also to overplay the extent to which the student-athlete's advisor participated in the negotiation process. After all, student-athletes are permitted to have advisors, and the only way the student-athletes can be "punished" for their failure to sign is if those advisors cross the bounds of permissible conduct. I do not contend that the Philadelphia Phillies embellished the facts in the Wetzler case; I simply caution that in similar cases, the NCAA enforcement staff must be wary of building infractions cases on the testimony of individuals who may have ulterior motives.

Another significant problem highlighted by the Wetzler case is the ambiguity of the no-agent rules. Consider the NCAA's public announcement of the sanction against Wetzler:

Oregon State University baseball student-athlete Ben Wetzler must miss 11 games (20 percent of the season) due to his involvement with an agent during the 2013 Major League Baseball draft. According to the facts of the case, which were agreed upon by the school and the NCAA, Wetzler sought help from an agent who attended meetings where Wetzler negotiated contract terms with the team.

NCAA rules allow a baseball student-athlete to receive advice from a lawyer or agent regarding a proposed professional sports contract. However, if the student-athlete is considering returning to an NCAA school, that advisor may not negotiate on behalf of a student-athlete or be present during discussions of a contract offer, including phone calls, email or in-person conversations. Along with the school, a student-athlete is responsible for maintaining his eligibility.

When an NCAA member school discovers a rules violation has occurred involving a student-athlete, it must declare the student-athlete ineligible and may ask the NCAA to restore eligibility. Oregon State submitted its reinstatement request Feb. 18. The

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122. Monda decided to go to medical school and forgo any opportunity to play major league baseball. Murphy, *supra* note 117.

123. Note that any such promises to sign are strictly verbal, often relayed through a third party (agent-advisor), and typically made during the intensity of a playing season, when ballplayers seldom have time to reflect seriously on their futures. Should it surprise a sophisticated ball club like the Phillies that young men may change their minds upon true reflection? As Wolever recognizes in his remarks, there is no "agreement" until after a written offer is put on the table and signed.

NCAA then worked with the school to finalize the facts of the case. The NCAA provided the school and student-athlete with a decision today, Feb. 21.<sup>124</sup>

The heart of the violation is found in two sentences: (1) Wetzler's advisor "*attended meetings where Wetzler negotiated contract terms*" with the Phillies; and (2) an advisor may not "*be present during discussions of a contract offer.*" The statement indicates that it is permissible for student-athletes to have an advisor, and it certainly suggests that *Wetzler*, not the advisor, was the person directly negotiating contract terms with the Phillies. But the advisor was present. As noted previously, the NCAA prohibition on advisor presence does *not* come from the NCAA bylaws, which restrict only *attorney* advisors from being present during contract negotiations.<sup>125</sup> Wetzler's advisor was not an attorney, and perhaps that was intentional on Wetzler's part: the harsher restrictions on attorney advisors are apparent from a look at the NCAA rulebook.<sup>126</sup>

One certainly could read the bylaws as allowing non-attorney advisors to be present during contract negotiations, as long as the advisor does not actively participate in the negotiations. However, as noted previously, the NCAA has purported to *interpret* the bylaws to prohibit the presence of non-attorney advisors as well.<sup>127</sup> That interpretation is included in an NCAA informational memorandum that is sent to student-athletes near the end of their junior year, presumably to guide them through the MLB draft process.<sup>128</sup> In Wetzler's case, however, the memo to "Division I Baseball Student-Athletes with Remaining Eligibility" was dated June 11, 2013, and

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124. NCAA Press Release, *supra* note 105.

125. *See supra* text accompanying notes 58–59.

126. As the case became public, a reporter identified Wetzler's advisor as Nik Lubisich of Portland, OR. Kerry Eggers, *OSU's Ben Wetzler Still Has One Pitch to Make*, PORTLAND TRIB. (Mar. 2, 2014), <http://portlandtribune.com/pt/12-sports/212650-70420-eggers-osus-ben-wetzler-still-has-one-pitch-to-make>. Lubisich is President and CEO of the Northwest Sports Management Group and according to the organization's website, Lubisich, a former MLB pitcher, is a certified agent with the Major League Baseball Players Association. *Nik Lubisich*, NORTHWEST SPORTS MANAGEMENT GROUP, <http://www.nwsportsmanagementgroup.com/#!nik-lubisich/cw5m> (last visited Mar. 17, 2015). The website also includes a section on "Amateur Athlete Advising," which indicates that while the NCAA prohibits student-athletes from hiring an "agent," it "does allow athletes and their families to utilize an 'advisor' to help facilitate them through the important events leading up to the MLB Draft or in selecting a college." *Services*, NORTHWEST SPORTS MANAGEMENT GROUP, <http://nwsportsmanagementgroup.com/services> (last visited Mar. 17, 2015). In September 2014, Lubisich stated publicly that he had served as Wetzler's advisor during Wetzler's negotiations with the Phillies in 2013. Connor Letourneau, *Ben Wetzler Responds to Firing of Philadelphia Phillies Assistant GM Marti Wolever*, OREGONIAN (Sept. 27, 2014), [http://www.oregonlive.com/beavers/index.ssf/2014/09/ben\\_wetzler\\_responds\\_to\\_firing.html](http://www.oregonlive.com/beavers/index.ssf/2014/09/ben_wetzler_responds_to_firing.html).

127. *See supra* text accompanying notes 58–59.

128. *See supra* text accompanying note 64.



in the first paragraph refers to “the upcoming 2013 Major League Baseball (MLB) first-year player draft scheduled for June 4-6.”<sup>129</sup>

Clearly, it is problematic to “inform” student-athletes of the rules after the fact. Moreover, at the time the memo presumably was sent, Wetzler was headed to Omaha to play in the College World Series with his teammates.<sup>130</sup> Thus, it seems highly likely that Wetzler would not have known about the NCAA’s non-attorney advisor-presence rule at the time he entered into contract negotiations with the Phillies. Perhaps the advisor should have known, and stayed away from any meetings during which such negotiations were conducted. But the informational memo expanding the presence rule beyond attorneys is not sent to agent-advisors, and it is certainly plausible that an advisor, particularly a relatively inexperienced one, likewise would be ignorant of the interpretation.

The NCAA bylaws also prohibit advisors from “marketing” a student-athlete’s athletics ability or reputation to professional organizations, or directly negotiating on behalf of a student-athlete.<sup>131</sup> But no evidence was cited in the Wetzler case to suggest either of those prohibited actions by Wetzler’s advisor. Indeed, in its final student-athlete reinstatement report, the NCAA staff cited as a mitigating factor in its penalty the fact that Wetzler’s advisor “did not engage directly in negotiations with MLB representatives.”<sup>132</sup>

Ultimately, then, the NCAA case against Ben Wetzler rested upon an interpretation that (1) is not in the NCAA bylaws, and (2) easily could have been unknown to both Wetzler and his advisor. And to top off the case, the student-athlete reinstatement committee’s final report cites Bylaw 12.3.2 as the governing legislation in the case.<sup>133</sup> That simply cannot be the basis of an ineligibility decision, however. Bylaw 12.3.2 addresses only *lawyer* presence at contract negotiations. Wetzler’s advisor was not a lawyer, and he cannot be converted into a lawyer through interpretations of the NCAA legislation. The only possible grounding for a competition-withholding penalty is a straightforward violation of the legislation prohibiting the re-

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129. NCAA 2013 Informational Memo, *supra* note 89, at 1.

130. The 2013 College World Series began on June 15, with the championship series scheduled for June 24–26. Benjamin Klein, *College World Series 2013: Early Predictions and Preview*, BLEACHER REPORT (June 12, 2013), <http://bleacherreport.com/articles/1670446-college-world-series-2013-early-predictions-and-preview>.

131. *See supra* text accompanying notes 41–49.

132. NAT’L COLLEGIATE ATHLETIC ASS’N, Student-Athlete Reinstatement and Secondary Infraction Case Report, Feb. 25, 2014 (on file with author). Student-athlete reinstatement reports are not publicly available due to student privacy concerns. *See supra* note 60.

133. NAT’L COLLEGIATE ATHLETIC ASS’N, Student-Athlete Reinstatement and Secondary Infraction Case Report, Feb. 25, 2014 (on file with author).

tention of an *agent*. Yet that also is problematic in light of the agent by-laws' focus on "marketing" and "negotiation."

Note in the NCAA's public statement of Wetzler's sanction the references to the word "agent": "Wetzler must miss 11 games . . . due to his involvement with an *agent* . . . . According to the facts of the case, . . . Wetzler sought help from an *agent* who attended meetings . . . ." <sup>134</sup> Admittedly, Wetzler's advisor was a certified MLBPA agent, <sup>135</sup> but the NCAA presented no specific rationale to explain why he could not serve as a non-agent "advisor" to this particular student-athlete—other than to say that if an advisor steps over the line set out in bylaw interpretations, he has become an agent.

The remaining difficulties with the Wetzler case relate to process. Note again the language of the NCAA's public statement: "According to the facts of the case, which were agreed upon by the school and the NCAA, . . . ." <sup>136</sup> No mention is made of the student-athlete's position. It did not matter whether Wetzler concurred in the agreed-upon fact description because a student-athlete reinstatement process essentially adjudicates a dispute involving only the institution and the NCAA. <sup>137</sup> Wetzler, for example, presumably would not have agreed that he retained an "agent" rather than an advisor.

In its concluding paragraph, the NCAA statement says, "When an NCAA member school discovers a rule violation, it must declare the student-athlete ineligible and may ask the NCAA to restore eligibility." <sup>138</sup> A member school typically "discovers a rule violation" when the NCAA enforcement staff comes knocking with an allegation that a violation has occurred. The institution can contest the allegation, but if it allows the student-athlete in question to compete while the matter is being resolved, the school risks harsher sanctions for competing with an ineligible student-athlete. Thus, the school typically accedes to the command that it "must declare the student-athlete ineligible" and seek reinstatement.

The student-athlete is permitted to submit a personal statement, in which he could protest the finding of a violation, but he ultimately is at the mercy of his institution. And timing can be critical. In Wetzler's case, the "findings of fact" were being formulated as the baseball season was starting. <sup>139</sup> If either the university or the student-athlete decide to mount a challenge to

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134. See *supra* text accompanying note 124.

135. See *supra* note 126.

136. See *supra* text accompanying note 124.

137. See NCAA Student-Athlete Reinstatement Summary, *supra* note 82.

138. See *supra* text accompanying note 124.

139. See Letourneau, *supra* note 103 (Oregon State hired an attorney in December 2013 and discussed the matter with NCAA officials until February 18, 2014, when the institution proposed a 10% withholding penalty, which was rejected by the NCAA; season-opening game in Tempe, AZ was on Friday, February 14).

the “finding” that a violation occurred, the challenge would prolong the issuance of a sanction, thus jeopardizing even more of the student-athlete’s playing season. As a result, it is sometimes in the student-athlete’s best interest simply to accept a violation, even if it is questionable, and proceed to a resolution of the case as quickly as possible.

The effect of the process is to place enormous power in the NCAA enforcement staff to find a violation, without the usual oversight by the Committee on Infractions. In a typical infractions case, the committee makes findings of violations after hearing evidence from all affected parties and ensuring that the enforcement staff has “made its case.”<sup>140</sup> Because student-athlete *reinstatement* is at the heart of a no-agent violation, that typical process is bypassed in favor of resolution by NCAA staff members—first the enforcement staff and then the student-athlete reinstatement staff.

Wetzler’s case is unusual only because of the Phillies’ active involvement in the development of the NCAA case against him and because of the resultant publicity generated by the Phillies’ actions. The NCAA has processed numerous other cases involving the no-agent rules, and it seems clear from that body of precedent that the enforcement and student-athlete reinstatement staffs have wide latitude to find a violation whenever a student-athlete’s advisor has *any* contact with a professional organization. Indeed, that is the position the NCAA has taken in its informational memorandum to baseball student-athletes: “an advisor may not . . . have any direct contact . . . with the professional sports team on your behalf.”<sup>141</sup>

The NCAA membership certainly has every reason to try to rein in unscrupulous agents and preserve its amateurism model. But not all agents are unscrupulous, and in baseball particularly, many are simply doing their jobs as advisors of student-athletes trying to navigate the MLB draft process at a busy time in their playing seasons. Representatives of MLB clubs clearly recognize the value of these agents, and often indicate that they “prefer dealing directly with agents, who know the ins and outs of the draft process.”<sup>142</sup> It seems past time for the NCAA to conduct a thoughtful reassessment of the substance and enforcement of its no-agent rules. The following section provides some modest recommendations to consider.

## V. RECOMMENDATIONS

The first recommendation is for the NCAA to reconsider the no-agent rules themselves, at least in baseball. After the *Oliver* decision in 2009,

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140. See Parkinson, *supra* note 80, at 225–27.

141. See *supra* text accompanying note 58.

142. Fitt, *supra* note 108.

many commentators urged the NCAA, in its zeal to enforce no-agent rules, to consider the unique features of the MLB draft.<sup>143</sup> Those features include the fact that, unlike college football and basketball players, who “declare” for the draft with a full understanding that they will forfeit their college eligibility by doing so, college and high school baseball players are drafted by MLB clubs without any formal declaration by the student-athletes that they seek to go pro.

Although most top draftees do indeed end up signing professional contracts (at least those drafted as college juniors rather than as high school seniors), some sincerely wish to explore their options, including the option of playing, or continuing to play, in college. To expect those young student-athletes to negotiate with MLB clubs on their own, particularly during busy spring baseball seasons (and, lest we forget, busy academic terms), seems unrealistic and may jeopardize student-athletes’ abilities to maximize their potential. To quote again from the court in *Oliver*, “the student-athlete should have the opportunity to have the tools present . . . that would allow him to make a wise decision without automatically being deemed a professional, especially when such contractual negotiations can be overwhelming even to those who are skilled in their implementation.”<sup>144</sup> In *Oliver* the “tool” was an attorney, but surely the same rationale applies to non-attorney advisors who can assist the student-athlete in making a “wise decision.”

NCAA leaders occasionally have expressed a willingness to reconsider the no-agent rules as they apply to baseball. As noted earlier in this article, the NCAA’s then-managing director for baseball suggested in 2011 the possibility of new rules in tune with baseball’s “unique set of circumstances.”<sup>145</sup> Yet more than three years later—and more than five years after the *Oliver* decision—the no-agent rules remain fully in force and enforced with as much rigor as ever. Indeed, the only meaningful change in the no-agent rules came in 2012, with a seeming *expansion* of the bylaw defining “agents,” so that even more advisor activities may be violations.<sup>146</sup>

The Wetzler case may provide a new impetus for the NCAA to reexamine its no-agent bylaws as applied to baseball. Not only did the case generate significant negative publicity for both the Philadelphia Phillies

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143. See, e.g., Borzi, *supra* note 32 (quoting critics of no-agent rules). See also Aaron Fitt, *Oliver Settlement Restores “No Agent” Rule*, BASEBALL AMERICA (Oct. 8, 2009), <http://www.baseballamerica.com/college/oliver-settlement-reinstates-no-agent-rule/>.

144. *Oliver v. Nat’l Collegiate Athletic Ass’n*, 155 Ohio Misc. 2d 17, 33 (Com. Pl. 2009).

145. See Zagier, *supra* note 74 and accompanying text.

146. See NCAA Bylaws, *supra* note 9, § 12.02.1. See *supra* text accompanying notes 44–45.

and the NCAA,<sup>147</sup> it also involved a student-athlete at Oregon State University. Oregon State is led by President Edward Ray, who served recently as chair of the NCAA's Executive Committee and who stood by NCAA President Mark Emmert in their joint public announcement of the censure of Penn State after its child sexual abuse scandal.<sup>148</sup> In other words, Ray may carry significant clout within the NCAA leadership, and his implicit approval of his institution's harsh words for the application of no-agent rules in the Wetzler case may be telling. In pointed public remarks after the NCAA announced its withholding penalty against Wetzler, the university's spokesperson, while announcing Oregon State's appeal of the sanction,<sup>149</sup> said the following:

What's clear to us is that individuals within the NCAA and member institutions have discussed this matter for some time, saying that this rule needs to be fixed. We think this is a very unfortunate circumstance. It really points out what's wrong when a student-athlete decides to evaluate a matter and return to school, and now he is punished.

Our point is that it's time to stand up for our student-athlete and the choice he made to return to college, but also to address that this matter needs to be changed. It doesn't make sense.<sup>150</sup>

Even if the NCAA provides no sort of "baseball exemption" from the no-agent bylaws, it at least must make those bylaws clear to those affected by them. Perhaps most troubling in media accounts of the Wetzler case was the presumption that Wetzler violated the rules because he engaged an "agent," and implicitly that he *knew* he violated the rules. It is entirely plausible, however, that Wetzler was caught completely off guard in November 2013 when he learned of the NCAA investigation; why would he

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147. See, e.g., Heitner, *supra* note 97.

148. Jenna Johnson, *NCAA Sanctions on Penn State "Unanimously" Backed by Boards of College Presidents*, WASH. POST (July 23, 2012), [http://www.washingtonpost.com/blogs/campus-overload/post/ncaa-sanctions-on-penn-state-unanimously-backed-by-boards-of-college-presidents/2012/07/23/gJQA0OsY4W\\_blog.html](http://www.washingtonpost.com/blogs/campus-overload/post/ncaa-sanctions-on-penn-state-unanimously-backed-by-boards-of-college-presidents/2012/07/23/gJQA0OsY4W_blog.html).

149. The university appealed the 20% withholding penalty imposed on Wetzler to a student-athlete reinstatement appeals committee, which affirmed the judgment of the student-athlete reinstatement staff and upheld the penalty. A university's president ultimately is responsible for the conduct of intercollegiate athletics. NCAA Bylaws, *supra* note 9, § 2.1.1 ("The institution's president or chancellor is responsible for the administration of all aspects of the athletics program . . ."). Thus, one can presume that President Ray approved both the appeal and the university's public statements regarding the case.

150. Gelb, *supra* note 109 (quoting Steve Clark, Oregon State University Vice President for University Relations and Marketing, and characterizing the Oregon State public statement as "a caustic, 821-word release late Friday night that questioned the intentions of the NCAA and its 'no-agent' bylaw").

assume he committed any violation when he retained a non-attorney advisor who did not “market” him to MLB clubs or “negotiate” with clubs on his behalf?<sup>151</sup>

As the investigation unfolded, it became clear that NCAA officials also considered other conduct by an advisor—conduct that is *not* proscribed by NCAA legislation/bylaws—to be violations as well. In particular, a staff *interpretation* of the bylaws—embodied in both an informational memorandum and an “educational column”<sup>152</sup>—considered both (1) *presence* of an advisor during contract negotiations, and (2) any *direct contact* between advisor and MLB club to be violations.<sup>153</sup> While both the memorandum and the educational column have been posted on the NCAA website, it is again entirely plausible that student-athletes, or even their advisors, would be unaware of them.

NCAA staff members clearly have an interest in ensuring that all relevant individuals are aware of the rules the staff will enforce. While it seems fair to hold those individuals to knowledge of the NCAA bylaws themselves, it also seems problematic to build an infractions case on interpretations that are not nearly as transparent. One obvious solution, of course, would be to incorporate the staff interpretations into the bylaws. Such a remedy also would ensure that the NCAA *membership* approves of the bylaws’ reach, rather than simply relying on the assumption that the NCAA staff speaks for the membership.<sup>154</sup> In the Wetzler case, for exam-

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151. The author of a recent article on the firing of Phillies scouting director Marti Wolever spoke with Wetzler, who apparently reported that he “hadn’t been briefed on the NCAA’s no-agent rule” in 2013, when the Phillies drafted him. Letourneau, *supra* note 126.

152. From time to time the NCAA will post “Educational Columns” on its website. According to the NCAA, these columns “are intended to assist the membership with the correct application of legislation and/or interpretations by providing clarifications, reminders and examples. They are based on legislation and official and staff interpretations applicable at the time of publication.” Moreover, the NCAA purports to make these educational columns “binding to the extent that the legislation and interpretations on which they are based remain applicable.” On July 5, 2012, the NCAA posted an educational column with questions and answers related to “NCAA Bylaw 12.02.1 – Definition of an Agent.” In answer to the question “May an advisor be present during negotiations between an individual and a professional team?”, the column states, “[a]n advisor may not be present during discussions of a contract offer with a professional team or have any direct contact (e.g., in person, by telephone or mail) with a professional sports team on the individual’s behalf without such action resulting in the advisor being considered an agent.” This column, of course, is consistent with the NCAA staff interpretation discussed previously in this article. The column may be currently on the ncaa.org website, but the author could not find it after an extensive search. A copy of the column is on file with the author.

153. NCAA Informational Memo, *supra* note 53. See also notes 58–59 and accompanying text.

154. New or amended bylaws take effect upon approval of the NCAA Board of Directors, which represents the membership. In Division I, proposals for new legisla-

ple, it seems clear that at least one prominent leader—Edward Ray, who served as chair of the NCAA’s Executive Committee—takes serious issue with the current application of the no-agent rules, at least to certain baseball student-athletes.

Moreover, even if all of the rules were embodied in NCAA legislation, the NCAA staff must recognize inherent ambiguities in the bylaw language and do whatever it can to clarify how that language will be interpreted and enforced. Certainly not every contingency can be anticipated; some cases involve novel fact scenarios, and those cases simply have to be resolved on an ad hoc basis. On the other hand, the legislation and interpretations include fundamental principles that are not always clearly understood: What does it mean to “market” a student-athlete’s athletics ability or reputation? Are all contacts between an agent and a professional organization “on behalf of” the student-athlete? Does it matter if the professional club initiates the contact? What constitutes “negotiation”? Under the new definition of an “agent,” is there any room left for non-agent advisors? Under what circumstances, for example, will an advisor *not* “seek[] to obtain any type of financial gain or benefit . . . from a student-athlete’s potential earnings as a professional athlete”?<sup>155</sup> All of these questions can arise in a no-agent case, so it is important that the NCAA staff is consistent and clear in its application of the rules.

NCAA member schools also need to step up and take responsibility in this area. Even the most prominent programs (like Oregon State in the Wetzler case<sup>156</sup>) have a very limited number of student-athletes who are legitimate draft prospects in any given year. Their compliance staffs should be responsible for (1) knowing *all* of the rules that the NCAA applies under no-agent legislation, including staff interpretations that easily can escape the attention of student-athletes and advisors; and (2) engaging in effective rules education for all student-athletes who may confront the MLB draft process. For example, if university personnel know that the NCAA enforcement staff considers the mere presence of an advisor (even a non-attorney advisor) during contract negotiations to be a violation and clearly

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tion (bylaws) are presented to a 31-member Legislative Council, with final review by an 18-member Board of Directors comprised of presidents and chancellors of member institutions. Provisions also exist for the membership to “override” legislation adopted by the Legislative Council or Board of Directors. NAT’L COLLEGIATE ATHLETIC ASS’N, *Division I Committees*, <http://www.ncaa.org/governance/committees?division=d1>.

155. NCAA Bylaws, *supra* note 9, § 12.02.1(b).

156. Oregon State advanced to the College World Series in 2013. 2014 OREGON STATE BASEBALL MEDIA GUIDE, *supra* note 99, at 56. In 2014 it was the number one overall seed entering postseason competition. *Oregon State No. 1 Seed for NCAA Baseball Tournament*, USA TODAY (May 26, 2014), <http://www.usatoday.com/story/sports/college/baseball/2014/05/26/ncaa-baseball-tournament-pairings-oregon-state-no-1/9598059/>.

communicate that “rule” to their student-athletes, it seems likely that the number of cases like Wetzler’s would be reduced.<sup>157</sup>

The NCAA no-agent legislation does permit member schools to constitute a “professional sports counseling panel” to advise the schools’ student-athletes who are interested in pursuing professional careers.<sup>158</sup> Such panels even are permitted to “enter into negotiations with a professional sports organization” on behalf of a student-athlete.<sup>159</sup> Because such panels are not mandatory, however, many schools do not have them.<sup>160</sup> Schools should consider whether such panels could provide valuable assistance to their student-athletes.

On the other hand, one commentator cautions that such institutional counseling panels may present additional problems. First, there is no guarantee that panels consisting of university staff and faculty will have the necessary expertise to provide sound advice to their student-athletes.<sup>161</sup> Second, such panels may have “an inherent conflict of interest” in advising student-athletes because university representatives may wish to have the student-athletes return to the institution to compete for another year rather than to have the student-athletes sign professional contracts and leave.<sup>162</sup> For these reasons, it may be wiser to put the principal burden on compliance staffs to educate their student-athletes regarding NCAA rules, and leave the “professional sports counseling” business to the professionals—agent-advisors who truly know the business.<sup>163</sup>

Finally, the NCAA should reassess its enforcement process in no-agent baseball cases. As long as the rules remain as ambiguous as they are, the NCAA enforcement staff has virtually unfettered discretion to determine that a no-agent violation has occurred—for example, to find that a student-athlete’s advisor has “marketed” the student-athlete’s athletics ability or reputation, that an advisor has contacted a professional organization on the student-athlete’s “behalf,” or that the advisor seeks to obtain a “financial benefit” from the student-athlete’s potential earnings as a professional athlete. And once the enforcement staff informs the institution that it believes

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157. Of course, student-athletes who are firmly committed to signing a professional contract may choose to have an advisor present, but at least they would be accepting the risks knowingly, should they change their minds and decide to return to school.

158. NCAA Bylaws, *supra* note 9, § 12.2.4.3.

159. *Id.*

160. Karcher, *supra* note 2, at 224.

161. *See id.* (questioning the qualifications of such panels).

162. *Id.*

163. On the other hand, agent-advisors may have their own conflicts of interest that are just as problematic as those of the institutions. Karcher advocates for allowing student-athletes to engage agents, with institutions providing guidance to student-athletes in the *selection* of agents—to help ensure that the student-athletes are not taken in by incompetent or unscrupulous agents. *Id.*



a violation occurred, the university typically feels compelled to accept that “finding” and begin the reinstatement process. Otherwise, if it resists the finding of a violation and allows the student-athlete to continue competing, the institution risks sanctions for competing with an ineligible student-athlete. Thus, even questionable cases proceed to the student-athlete reinstatement staff for a determination of a withholding penalty.

With today’s “hard slotting” system in the MLB draft, in which MLB clubs lose money “slotted” for draft picks who do not sign, MLB clubs have even more incentive to “turn in” student-athletes they fail to sign—particularly if the Philadelphia Phillies suffer no repercussions from their involvement in the NCAA’s case against Ben Wetzler.<sup>164</sup> Student-athletes who seek to preserve the option to compete at the collegiate level already are at a significant disadvantage vis-à-vis MLB clubs because NCAA no-agent rules leave them to their own devices, without the active assistance of an advisor during contract negotiations. That disadvantage is compounded when a student-athlete’s college eligibility is jeopardized if his advisor has even the slightest contact with an MLB club and the student-athlete believes the club may report that contact to the NCAA if he does not sign.

Surely the NCAA enforcement staff understands the pressures the hard-slotting system places upon scouts to sign their club’s draftees. Those pressures easily could motivate scouts to embellish the contacts they have had with draftees’ advisors, or even to initiate and solidify contacts with those advisors so that the draftees’ collegiate eligibility already is in jeopardy by the time of contract negotiations. For the enforcement staff, the lesson is simply to understand and account for potential ulterior motives by MLB club representatives when building a no-agent case against a student-athlete.<sup>165</sup> The same ulterior motives, of course, may exist when the principal witness is a scorned agent (as in *Oliver*) rather than the representative of a scorned MLB club.

In light of these factors, the NCAA leadership should consider whether another layer of oversight is advisable. An independent appeals committee is available to review withholding penalties imposed by the student-athlete

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164. Marti Wolever, the Phillies’ scouting director, stated in May 2014 that the Wetzler case “has not hurt us a lick. . . . [T]o this point, we really have not had any problems with agents or players, families.” Murphy, *supra* note 117. Indeed, according to Wolever, “you wouldn’t believe the number of people in professional baseball who have come up to me and our group over the course of the year and say, thank you for what you did. You guys aren’t the bad guys in this situation.” *Id.* Interestingly, Wolever was fired by the Phillies in September 2014, and some wonder if the Wetzler case played a role in that decision. See Letourneau, *supra* note 126.

165. That understanding is particularly important if enforcement staff members automatically approach all agent-advisor involvement with a skeptical eye. After all, in many no-agent cases, fact-findings will boil down to an assessment of the relative credibility of agent-advisors vis-à-vis MLB club representatives. The student-athletes themselves may have no knowledge of the extent of the advisor-club contacts.

reinstatement staff,<sup>166</sup> but by that time, it is too late to address the merits of a no-agent case—the staff and the involved institution already have agreed on a set of facts, and the appeals committee’s role is to determine whether the penalty is appropriate. In other infractions cases, fact-findings are made by the Committee on Infractions, based on a review of evidence presented by all interested parties. While I hesitate to recommend additional “process” to an already complicated procedural scheme, I do believe there is value in at least abbreviated oversight by the infractions committee of no-agent findings by the NCAA staff. The fact that the Division I infractions committee recently has been expanded from ten members to over twenty members may make such oversight feasible.<sup>167</sup>

All of these recommendations are based on the welfare of the student-athlete, a guiding principle for all NCAA legislation.<sup>168</sup> The MLB draft process is daunting enough for student-athletes in the midst of their academic studies and playing seasons. Their vulnerability is enhanced by a prohibition against advisor participation in contract negotiations with professional clubs. If the NCAA leadership truly expects student-athletes to navigate the draft terrain without the meaningful involvement of competent advisors, at the very least it should ensure that all of its rules are clear, widely disseminated, and consistently applied. Finally, the process by which the NCAA staff resolves no-agent cases should take into account student-athlete vulnerabilities and inspire confidence, not doubt, that student-athlete welfare is paramount.

## VI. CONCLUSION

Two types of student-athletes become involved in the Major League Baseball draft process—(1) those who are sure they want to begin professional careers as soon as possible, and (2) those who are not so sure and thus want to preserve their options, including competing in college. The

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166. “A school may appeal decisions made by the reinstatement staff to the Committee on Student-Athlete Reinstatement.” NCAA Student-Athlete Reinstatement Summary, *supra* note 82.

167. The expansion of the Committee on Infractions was part of a series of “reforms” initiated by NCAA President Mark Emmert. An “Enforcement Working Group” recommended the change, which was adopted in October 2012 and became effective August 1, 2013. NAT’L COLLEGIATE ATHLETIC ASS’N, *New Reform Efforts Take Hold August 1*, <http://www.ncaa.org/about/resources/media-center/news/new-reform-efforts-take-hold-august-1>.

168. NCAA Bylaws, *supra* note 9, § 2.2 (“Intercollegiate athletics programs shall be conducted in a manner designed to protect and enhance the physical and educational well-being of student-athletes.”); *see also* John Curley Center for Sports Journalism at Penn State, SPORTS, MEDIA & SOCIETY (Nov. 19, 2010), <http://sportsmediasociety.blogspot.com/2010/11/emmert-on-student-athletes-and.html> (a month into new role as NCAA President, Mark Emmert asserting focus on student-athlete welfare as a top priority of NCAA).

former can hire an agent and actively use that agent's knowledge and expertise in negotiations with MLB clubs, in order to ensure as bright a professional career as possible. Under NCAA rules, the latter cannot; instead, they face an unsavory choice: they can negotiate with seasoned MLB club representatives on their own, with an obvious downside to their bargaining position, or they can engage an advisor to assist them and run the risk that they will lose their eligibility to compete in college if that advisor's activities go the slightest bit too far.<sup>169</sup>

Despite substantial criticism of the NCAA's no-agent rules as they are applied to the sport of baseball, the NCAA staff seems to have redoubled its enforcement efforts, perhaps as part of an overall initiative to crack down on the pernicious influence of agents on the NCAA's broader amateurism model.<sup>170</sup> Not only does the NCAA staff continue to enforce the no-agent rules vigorously, it also appears to have toughened its stance in three respects. First, it has extended the no-agent proscriptions beyond the language of NCAA legislation by rendering "interpretations" prohibiting virtually any contact between advisors and MLB clubs. Second, a revised NCAA informational memo in 2014 adds language to make clear student-athletes will be found ineligible even if their advisors' contact with MLB clubs is "independent"—that is, without the student-athlete's direction or even knowledge.<sup>171</sup> Finally, if the Wetzler case is any indication, the NCAA staff is working hand-in-hand with professional clubs to scrutinize the conduct of student-athletes who were drafted but chose to forgo their professional option and compete (or return to competition) in college.

This enforcement focus seems perverse in some respects because it targets student-athletes that seemingly deserve the NCAA's commendation—*student*-athletes who have resisted the lure of professional competition and committed (or recommitted, in the case of college juniors) to furthering their education and competing at the intercollegiate level. Should those student-athletes be put at a disadvantage in negotiating a favorable professional contract simply because they retain an interest in competing in college if the professional option turns out to be ill-advised?

The *Oliver* court recognized in 2009 the bargaining disparity between student-athletes and professional sports organizations, and struck down as

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169. Another option exists, of course: hire an agent-advisor, allow that agent to engage fully with MLB clubs, and hope the NCAA does not find out if one chooses ultimately to reject a professional offer and compete in college. If professional scouts are to be believed, that choice is widespread.

170. See, e.g., NAT'L COLLEGIATE ATHLETIC ASS'N, *Amateurism Cabinet Seeks Expanded Definition of Agents*, <http://www.ncaa.org/about/resources/media-center/news/amateurism-cabinet-seeks-expanded-definition-agents> (noting President Mark Emmert making "the agent issue" a top priority in his first State of the Association address at the 2011 NCAA Convention).

171. See NCAA 2013 Informational Memo, *supra* note 89.

arbitrary and capricious an NCAA rule prohibiting student-athletes' attorneys from being present during contract negotiations with MLB clubs. The court later vacated its decision when the NCAA reached a settlement with the plaintiff, thus leaving the rule intact. However, one of the court's fundamental concerns—whether the NCAA, by prohibiting student-athletes from being actively represented during the negotiation process, leaves them vulnerable to overreaching by MLB clubs—remains intact as well.

The *Oliver* decision raised important questions about the fairness of the no-agent rules, and those questions deserve further examination. One aspect of *Oliver*, however, sets it apart from more recent cases like that involving Ben Wetzler. At least the legislation was clear in *Oliver*: no lawyer representatives of student-athletes may be present during contract negotiations with MLB clubs. Oliver and his attorney presumably chose to ignore the applicable bylaw because they felt it unjust.

In the Wetzler case, like many others involving non-attorney advisors, the rules were not clear, unless one accepts as binding staff interpretations that have never been given the imprimatur of the NCAA membership. If the Oregon State University President's reaction to the Wetzler case is any indication, it is questionable whether the membership would agree that *any* "direct contact" between an advisor and a professional team, or the presence and silent observation of an advisor during contract negotiations, should be a violation.

Even if the staff interpretations do carry the authority of bylaws (at least until they are rejected by the membership), the NCAA staff must ensure that all individuals subject to the interpretations are fully aware of them. It has been problematic after *Oliver* to deny student-athletes the advice of competent counsel; it is doubly problematic to build an infractions case on interpretations that could escape the knowledge of even a diligent student-athlete or advisor.

Ultimately, the NCAA's focus on student-athlete welfare should guide deliberations in the no-agent arena. If those governing principles suggest the value of legislative change, the NCAA leadership should act accordingly. Student-athletes' careers—both in college and professionally—depend upon it.



# ATHLETIC COMPENSATION FOR WOMEN TOO? TITLE IX IMPLICATIONS OF *NORTHWESTERN* AND *O'BANNON*

ERIN E. BUZUVIS\*

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This Article examines the role that Title IX has played in the debate over college athlete compensation, including the litigation that seeks to challenge the National Collegiate Athletic Association's longstanding policies that prohibit members from compensating athletes or sharing with them the revenue produced by the licensing of their names and likenesses.<sup>1</sup>

Title IX, a federal statute passed in 1972, prohibits sex discrimination in educational institutions that receive federal funds.<sup>2</sup> In Title IX's early days, the NCAA was not a great fan of the law. In fact, the association backed political and litigation efforts in the 1970s and 80s aimed at foreclosing the statute's application to athletics.<sup>3</sup> Today, however, as the NCAA faces public criticism and legal action over its policies that prohibit compensation for college athletes, it has taken to using Title IX as a defensive shield. In response to the argument that withholding compensation from athletes whose labor generates millions of dollars of revenue is tantamount to exploitation, the NCAA argues that paying athletes in revenue sports, coupled with the commensurate obligation under Title IX to pay female athletes, would be prohibitively expensive for college athletics as we know it.<sup>4</sup> Ergo, no pay for play.

1. Northwestern Univ. & Coll. Athletes Players Ass'n., N.L.R.B. No. 13-RC-121359 (Reg. 13 Mar. 26, 2013), *available at* <http://mynlrb.nlr.gov/link/document.aspx/09031d4581667b6f>; *O'Bannon v. NCAA*, 7 F. Supp. 3d 955 (N.D. Cal. 2014).

2. 20 U.S.C. §§ 1681–1688 (2012).

3. RONALD A. SMITH, *PAY FOR PLAY: A HISTORY OF BIG-TIME COLLEGE ATHLETICS REFORM* 147 (2011); Sara A. Elliott & Daniel S. Mason, *Gender Equity in Intercollegiate Athletics: An Alternative Model to Achieving Title IX Compliance*, 11 J. LEGAL ASPECTS SPORT 1, 11 (2001).

4. *See, e.g.*, NCAA's Memorandum of Points and Authorities in Support of Motion for Summary Judgment, In re NCAA Student-Athlete Name and Likeness Licensing Litigation, No. 09-CV-1967-CW, 2013 WL 6818041, at \*22–24 (N.D. Cal. Dec. 12, 2013) (arguing that amateurism policy helps ensure member institutions' financial ability to offer women's sports and less prominent men's sports); Declaration of James E. Delany in Support of the NCAA's Class Certification Opposition Brief, In re NCAA Student-Athlete Name and Likeness Licensing Litigation, No. 09-CV-1967-CW, 2013 WL 1100330, at ¶ 10 (N.D. Cal. Mar. 14, 2013) (Big Ten Commissioner argues that pay-for-play would "seriously undermine the objectives of Title IX and reduce other athletic opportunities for students, regardless of gender."); *see also* Editorial Board, *Pay for Play and Title IX*, N.Y. TIMES, Mar. 22, 2014, [http://www.nytimes.com/2014/03/23/opinion/sunday/pay-for-play-and-title-ix.html?\\_r=0](http://www.nytimes.com/2014/03/23/opinion/sunday/pay-for-play-and-title-ix.html?_r=0); Kevin Trahan, *Why the NCAA's Title IX Excuse No Longer Works*, SB

This position has made Title IX the enemy of those who support the reform of college athletics to eliminate the exploitation of college athlete labor.<sup>5</sup> If Title IX does not require schools that pay male athletes in revenue sports to also pay female athletes in nonrevenue sports, then the NCAA cannot sustain its positioning of Title IX as an obstacle to athlete compensation. The debate about what Title IX would or would not require is therefore operating as a proxy for whether college athletics should or should not reform in a way that addresses the exploitation of uncompensated labor.

This Article seeks to advance two positions. First, that the NCAA is right: In a world where male athletes in revenue sports are paid, Title IX would require payment of female athletes using some measure of equality. Second, that NCAA's critics are right: athletes are being exploited by the present system. But, the reformers needn't fear the NCAA's use of Title IX as a shield. Used properly, Title IX presents the reformers with a sword. If, as the NCAA has suggested, Title IX implications render the application of labor and antitrust law to college athletics prohibitively expensive, the NCAA's only choice will be to reform college athletics to restore the primacy of educational over commercial values, or alternatively, to separate the commercial interests from higher education entirely. Either approach would simultaneously address concerns about the exploitation of uncompensated labor, gender equity, and cost containment. For this reason, it is important that college athletics confront the Title IX implications of decisions that result in compensation for athletes.

This Article will proceed in three parts. First, it will describe the controversy over athlete compensation, including the NCAA's amateurism position over time and the challenges to that position that have been mounted in courts of public opinion as well as in the courts of law. One such case is that of Northwestern University's football players, who won a momentous decision in the spring of 2014, when a regional-level opinion of the National Labor Relations Board agreed that they were being treated like employees and thus had the right to engage in collective bargaining with their institution. Another is the class-action lawsuit lead by former UCLA basketball player Ed O'Bannon against the NCAA. This summer, a

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NATION (Apr. 14, 2014), <http://www.sbnation.com/college-football/2014/4/14/5613112/ncaa-title-9-ed-obannon>; Mechelle Voepel, *Title IX a Pay-for-Play Roadblock*, ESPN (July 15, 2011), [http://espn.go.com/college-sports/story/\\_/id/6769337/title-ix-seen-substantial-roadblock-pay-play-college-athletics](http://espn.go.com/college-sports/story/_/id/6769337/title-ix-seen-substantial-roadblock-pay-play-college-athletics).

5. See, e.g., Marc Edelman, *When It Comes to Paying College Athletes Title IX Is More of a Red Herring than a Pink Elephant*, FORBES (Feb. 4, 2014), <http://www.forbes.com/sites/marcedelman/2014/02/04/when-it-comes-to-paying-college-athletes-is-title-ix-more-of-a-red-herring-than-a-pink-elephant/>; Ellen J. Staurowsky, "A Radical Proposal": *Title IX Has No Place in College Sport Pay-For-Play Discussions*, 22 MARQ. SPORTS L. REV. 575 (2012).



federal district court agreed with the plaintiffs that the NCAA violated federal antitrust law by prohibiting institutions from allowing athletes to share in the revenue institutions derive from licensing their athletes' names and likenesses.

Second, this Article will examine the consequences for college athletics under Title IX should athletes prevail in any of the litigation challenging their exploitation in revenue sports. It concludes that college athletic departments would have a legal obligation under Title IX to provide commensurate compensation for female athletes. Though such an outcome conflicts with principles of capitalism, which would otherwise operate to limit compensation to those athletes whose labor has value on the open market, it is nevertheless the right result. That is because an institution's obligation to pay female athletes arises from application of a civil rights law, which in the context of Title IX and other such laws, reflects democratic consensus of the priority equality over the freedom of private entities to make unconstrained market choices in such fundamental contexts as education.

In its third Part, this Article will reframe the application of Title IX to athlete compensation as a tool, rather than an obstacle, to achieving college athletics reform. It takes the NCAA at its word that complying with a requirement under *Northwestern* or *O'Bannon* to allow some degree of athlete compensation, in combination with Title IX, is prohibitively expensive, at least for most institutions. This reality could therefore motivate college athletics to reform its way out of having to comply with labor and antitrust law by curtailing the ways in which college athletics has become overly commercialized, since such reform would operate to neutralize the application of both decisions. Alternatively, college athletics departments could reform themselves by abandoning their connection to education and the subsidy that comes with it. Purely commercialized programs would embrace the obligation to comply with antitrust and labor law, but would insulate themselves from Title IX. By helping to push hybrid programs into the paradigm of one or the other, educational or commercial, the Title IX implications of *Northwestern* and *O'Bannon* can help to leverage meaningful athletics reform that minimizes athlete exploitation, promotes gender equity, and contains cost.

### I. THE CONTROVERSY OVER COLLEGE ATHLETE AMATEURISM

Intercollegiate athletics began in August 1852, when the rowing teams from Harvard and Yale met at Lake Winnepesaukee, New Hampshire, for an exhibition race.<sup>6</sup> This athletic contest did not occur because students were passionate about rowing and eager to test their skills against like-minded

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6. SMITH, *supra* note 3, at 1.

competitors. It was not the brainchild of university officials seeking to foster school spirit through friendly athletic rivalry. Nor was it suggested by the faculty seeking to enhance students' character education by immersion in such concepts as discipline and endurance. Rather, the first intercollegiate athletic competition was a commercial proposition. It was sponsored by the Boston, Concord, and Montreal Railroad as a way to promote travel and tourism to the New Hampshire lakes' region. The nascent railroad paid for the competitors' vacations in exchange for the athletes' participation in the exhibition race before a thousand spectators.<sup>7</sup>

Notably, the origin of intercollegiate athletes occurred under pretenses that are prohibited today. The NCAA, the association of colleges and universities that regulates intercollegiate athletics, promotes the view that students who participate in intercollegiate athletics embody the ideals of amateurism. They play for the love of the game, not for perks or compensation. It uses the phrase "student-athlete" to drive home the distinction between college players and their professional counterparts,<sup>8</sup> and its slogan describes them as mostly "going pro in something other than sport."<sup>9</sup> Unlike their early predecessors, today's "student-athletes" are prohibited from selling their services to the likes of the BCM Railroad in exchange for compensation in the form of free vacations.<sup>10</sup>

The NCAA's position on amateurism has evolved over the years. It has also been controversial long before litigation came to a head this year. That history, as well as the present-day controversy—including the litigation—is the subject of this Part.

#### A. Background on the NCAA's Amateurism Policy

The NCAA's amateurism policy has been controversial throughout the organization's history. At the turn of the last century, college and

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7. *Id.*; STEVEN A. RIESS, *SPORT IN INDUSTRIAL AMERICA 1850–1920* (2012).

8. Ellen J. Staurowsky & Allen J. Sack, *Reconsidering the Term Student-Athlete in Academic Research*, 19 *J. OF SPORT MANAGEMENT* 103, 105 (2005).

9. Press Release, *NCAA Launches Latest Public Service Announcements, Introduces New Student-Focused Website*, NCAA (Mar. 13, 2007), <http://fs.ncaa.org/Docs/PressArchive/2007/Announcements/NCAA%2BLaunches%2BLatest%2BPublic%2BService%2BAnnouncements%2BIntroduces%2BNew%2BStudent-Focused%2BWebsite.html>.

10. *See generally* NCAA BYLAWS, art. 12, *reprinted in* Nat'l Collegiate Athletics Ass'n, 2014–2015 NCAA DIVISION I MANUAL OCTOBER VERSION [hereinafter NCAA MANUAL], at 57, *available at* <http://www.ncaapublications.com/p-4380-2014-2015-ncaa-division-i-manual-october-version.aspx>; NCAA BYLAWS, art. 12.1.2(a), *reprinted in* NCAA MANUAL, at 59 (declaring a student-athlete ineligible for competition if he or she "uses his skills for any form of pay in that sport," where "pay" is defined to include "salary, gratuity, or any form of competition"); NCAA BYLAWS, art. 12.1.2.1.4.3, *reprinted in* NCAA MANUAL, at 60 (limiting what a student-athlete can accept from an outside sponsor to include only "actual and necessary expenses.").

university leaders created the NCAA under political pressure to standardize the rules of football in the hopes of lowering the game's mortality rate.<sup>11</sup> At the NCAA's first convention in 1906, however, the topic of amateurism was also on the table, as some delegates argued for rules that would have prohibited athletic departments from accepting any funding other than direct support from the college or university.<sup>12</sup> But instead, the prevailing model of amateurism that emerged from that convention focused on keeping the students, not the institutions, free of influence and pressure that comes from money. Universities and their alumni could not offer compensation for a student's athletic services, and students were deemed ineligible if they had ever accepted payment for competing in a sporting event.<sup>13</sup>

At the same time, however, colleges and universities were realizing that athletic programs could generate some revenue and, perhaps of even greater value, institutional publicity.<sup>14</sup> These commercial pressures made it difficult to resist the temptation to field competitive teams, especially in football. And since the NCAA at the time relied on the honor system method of compliance, member institutions found it easy to skirt the rules: coaches paid athletes from funds designated for "needy students" or found fake jobs for them on campus.<sup>15</sup> Alumni contributions subsidized tuition and living expenses for players, and financial aid offices subsidized tuition for athletes who had no academic interest or ability.<sup>16</sup> A report published by the Carnegie Foundation for the Advancement of Teaching in 1929 found that 81 out of 112 colleges studied subsidized athletes' tuition by means such as jobs, loans, athletic scholarships, and outright compensation and other perks.<sup>17</sup> Such evidence of the failure of NCAA's amateurism code has caused some scholars to liken it to Prohibition: similarly difficult to enforce, and serving only to drive the targeted conduct underground.<sup>18</sup> Eventually, institutions didn't even try to keep these practices hidden. When conferences began adopting conflicting positions on amateurism, as happened, for example, when the Southeastern Conference became first to

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11. W. Burlette Carter, *The Age of Innocence: The First 25 Years of The National Collegiate Athletic Association, 1906 to 1931*, 8 VAND. J. ENT. & TECH. L. 211, 215 (2006).

12. *Id.* at 222–23; RANDY R. GRANT *ET AL.*, THE ECONOMICS OF INTERCOLLEGIATE SPORT 24–25 (2008). The initial bylaws also banned recruiting and participation by freshmen. *Id.*

13. GRANT, *supra* note 12, at 22–23.

14. ALLEN L. SACK & ELLEN J. STAUROWKSY, COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA'S AMATEUR MYTH 20 (1998).

15. *Id.*

16. *Id.* at 23.

17. *Id.* at 36.

18. *Id.*

openly allow athletic scholarships in 1936, the NCAA was powerless to object.<sup>19</sup>

Intolerance for these abuses eventually led the NCAA to undertake a massive reform effort in 1948. Later dubbed the “Sanity Code,” this reform attempted to recommit the membership to a purer model of athlete amateurism in which athletic scholarships, along with other vestiges of professionalism, would be prohibited. The Sanity Code also created new mechanisms for enforcement that, for the first time, created the possibility that violators would be expelled from the NCAA.<sup>20</sup> Quickly, however, the NCAA caved to the preferences of its more powerful members, and in 1950 changed course on the issue of athletic scholarships. That year, the NCAA membership voted to allow them so long as they were administered by the institution’s financial aid office rather than the athletics department.<sup>21</sup> Still, even after they were permitted, some colleges and universities declined to offer athletic scholarships. The Ivy League voted in 1954 to prohibit athletic scholarships and enforce other measures designed to ensure athletics remained secondary to academic mission of its member institutions.<sup>22</sup> Other schools that shunned scholarships out of commitment to an educational model of athletics eventually became Division III when the NCAA adopted its three-division structure in 1973.<sup>23</sup>

Meanwhile, athletes and others began taking the view that athletic scholarships operated as compensation and rendered athletes employees of the college or university—in particular, for purposes of workers’ compensation law.<sup>24</sup> In 1963, a California court ruled that a Cal Poly football player killed in a plane crash returning from a game in 1960 was an employee for purposes of California’s workers compensation law.<sup>25</sup> This ruling, which allowed the players’ family to recover financial compensation for his death, “sent shock waves through the NCAA.”<sup>26</sup> Leadership counseled member institutions “to avoid the impression that athletes had to participate in sports in order to retain their athletic scholarships.”<sup>27</sup> The NCAA coined the phrase “student-athlete” to distance collegiate athletes from their professional counterparts, and advised its members to include disclaimers stating scholarships did not constitute payment for participation.<sup>28</sup> As a result of this veneer, NCAA members

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19. SMITH, *supra* note 3, at 85, 89; GRANT, *supra* note 12, at 31.

20. GRANT, *supra* note 12, at 31.

21. *Id.* at 32.

22. SACK & STAUROWSKY, *supra* note 14, at 49.

23. *Id.*

24. *Id.* at 80–81.

25. *Van Horn v. Indus. Accident Comm’n*, 219 Cal. App. 2d 457, 460 (1963).

26. SACK & STAUROWSKY, *supra* note 14, at 81.

27. *Id.* at 82.

28. *Id.* at 83; *see also* WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING

prevailed in the next wave of workers compensation decisions. The Indiana Supreme Court ruled in 1983 that a player paralyzed during basketball practice could not recover under workers compensation law as an employee of Indiana State because he did not consider the scholarship to be compensation, as evidenced by his failure to report it on his tax returns.<sup>29</sup> That same year, the Michigan Court of Appeals held that an injured student-athlete was nevertheless not an employee under workers compensation law.<sup>30</sup> Though the court considered an athletic scholarship to be compensation,<sup>31</sup> that factor was outweighed by other findings that weighed against the athlete's employee status, such as the lack of the university's control over the athlete and the status of football as a non-integral aspect of the university's business.<sup>32</sup> Remarkably, these victories came notwithstanding changes to the NCAA bylaws—one (1967) allowing universities to cancel scholarships during the award period for misconduct and insubordinate and another (1973) that prohibited multi-year scholarships<sup>33</sup>—that had rendered the continuation and renewal of athletic scholarships to be conditioned on performance, a hallmark of employment-based compensation.

#### B. The NCAA's Amateurism Policy Today

The NCAA's present policy on amateurism permits member institutions in Division I and II to offer scholarships tied to a student's participation in athletics. Bylaws limit athletics grant-in-aid to the cost of tuition, room and board, and books.<sup>34</sup> They also prohibit member institutions from offering any additional payments beyond grant-in-aid that would in any way compensate students for their athletic participation,<sup>35</sup> and prohibit athletes themselves from accepting such compensation from third parties.<sup>36</sup>

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COLLEGE ATHLETES 72 (1995) (on the coining of "student-athlete.").

29. *Rensing v. Ind. State Univ. Bd. of Trs.*, 444 N.E.2d 1170 (Ind. 1983).

30. *Coleman v. Western Mich. Univ.*, 336 N.W.2d 224 (Mich. Ct. App. 1983).

31. *Id.* at 226.

32. *Id.* at 226–27. The court also found it relevant that the university could not cancel the scholarship based on performance, though this was not true. SACK & STAUROWSKY, *supra* note 14, at 87–88.

33. GRANT, *supra* note 12, at 35; SACK & STAUROWSKY, *supra* note 14, at 83–84.

34. NCAA BYLAWS, art. 15.02.5, *reprinted in* NCAA MANUAL, *supra* note 10, at 189. For athletes who are otherwise eligible for other institutional financial aid (i.e., that is not based on athletics), the bylaws cap their awards at the cost of attendance. NCAA BYLAWS, art. 15.1, *reprinted in* NCAA MANUAL, *supra* note 10, at 190.

35. Otherwise, the only other payment an athlete may receive from his or her institution is going-rate compensation for services actually rendered in the context of a work-study job. NCAA BYLAWS, art. 12.1.2, *reprinted in* NCAA MANUAL, *supra* note 10, at 59; NCAA BYLAWS, art. 12.4.1, *reprinted in* NCAA MANUAL, *supra* note 10, at 67.

36. The bylaws prohibit student-athletes from accepting direct or indirect

The restriction on compensation from third-parties operates to prevent athletes from licensing their names, images, and likeness, to those, like broadcasters, video game producers, and merchandise manufacturers, who would otherwise pay the athlete for that right. Relatedly, as a condition for eligibility, athletes sign a form that authorizes the NCAA and third parties acting on its behalf to use their names and likeness to promote the association's events.<sup>37</sup> The form apparently operates to relinquish athletes' rights in perpetuity to the commercial use of their names, images, and likenesses, including after they graduate.<sup>38</sup>

While athletes themselves are restricted to amateur status, there is nothing amateur about the big time collegiate athletic programs for which they play. Institutions that compete in the NCAA's Division I—particularly, the Football Bowl Subdivision—invest millions of dollars in facilities, operating and recruiting costs, and coaches' salaries,<sup>39</sup> and they expect a positive return, whether that be from the distribution of bowl game television contracts, NCAA basketball tournament proceeds, season ticket sales, or other sources.<sup>40</sup> Motivated by business objectives rather than educational ones, college athletic departments drive the competitive market for well-compensated head coaches (who are sometimes the highest paid public employee in their state) and spend lavishly on amenities and facilities designed to attract the top recruits.<sup>41</sup> Some institutions do manage to profit handsomely on the investments they make in their football and men's basketball programs.<sup>42</sup> However, it is these profits that open up big-

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compensation or gifts in any way connected to their participation as college athletes, including sponsorships in excess of "actual and necessary expenses" to participate in non-collegiate competitions. NCAA BYLAWS, art. 12.1.2, *reprinted in* NCAA MANUAL, *supra* note 10, at 59.

37. NCAA BYLAWS, art. 12.5.1.1, *reprinted in* NCAA MANUAL, *supra* note 10, at 68; NCAA BYLAWS, art. 12.5.2, *reprinted in* NCAA MANUAL, *supra* note 10, at 71; NCAA Form 08-3a.

38. *O'Bannon v. NCAA*, Nos. C-09-1967-CW, C-09-3329-CW, C-09-4882-CW, 2010 WL 445190 at \*1 (N.D. Cal. Feb. 8, 2010).

39. In the Football Bowl Subdivision, institutions' median expenditures on athletics in fiscal year 2013 was \$62,227,000, while the highest reported was \$146,808,000. NCAA REVENUES & EXPENSES DIVISION I REPORT 24, tbl. 3.1 (2014), *available at* <http://www.ncaapublications.com/productdownloads/D1REVEXP2013.pdf>. Football programs are the most expensive; the median expenditure for football programs was \$15,279,000 and the highest reported was \$41,550,000. *Id.* at 25, tbl. 3.4.

40. *See id.* at 30, tbl. 3.7 (breaking down revenue by source).

41. *See id.* at 32–33, tbl. 3.9 (providing a breakdown of expenses by type); KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS, COLLEGE SPORTS 101: A PRIMER ON MONEY, ATHLETICS, AND HIGHER EDUCATION IN THE 21ST CENTURY 11–12, 16–17 (2009), *available at* <http://www.knightcommission.org/images/pdfs/cs101.pdf> (describing arms race in expenditures for facilities and coaches' salaries).

42. The reported median figure for revenue generated by Division I FBS athletics programs was \$41,897,000 in 2013; the highest reported was \$165,691,000. NCAA

time athletic programs to the criticism that they are exploiting the free labor of athletes who make those profits possible.<sup>43</sup>

Defenders of amateurism refute arguments that athletes are exploited by pointing out that athletes often receive scholarship assistance to attend college.<sup>44</sup> They argue that some athletes receive federal Pell Grants (need-based financial aid) in addition to their athletic scholarships, which may exceed the cost of attendance of for some athletes.<sup>45</sup> Yet, proponents of athlete compensation argue that for many athletes, scholarship and other support is insufficient to cover the true cost of attending college.<sup>46</sup> Moreover, the time commitment required of athletes in these big-time programs precludes many of them from holding down the kind of part-time job that other college students have to make ends meet. In addition, it is not always clear that athletes receive a meaningful education in exchange for their athletic participation. Athletes are routinely clustered into easy and potentially useless majors, denied opportunities for academic enrichment such as internships, and assigned to “tutors” complicit in academic fraud.<sup>47</sup>

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REVENUES & EXPENSES DIVISION I REPORT, *supra* note 39, at 22, tbl. 3.1. Football programs were the most lucrative. The median reported figure for football revenue was \$20,278,000 and the highest was \$109,400,000. *Id.* at 25, tbl. 3.4.

In terms of *net* revenue, only 20 of the 123 institutions in Division I FBS reported a profitable athletic department, a median figure of \$8,449,000. *Id.* at 28, tbl. 3.5. The other 103 reported losses with median figure of \$14,904,000. *Id.* Looking at football programs, 69 reported net earnings from their football programs, with a median reported figure of \$12,926,000. *Id.* at 27, tbl. 3.6. The other 54 institutions lost money on football with a median reported figure of \$3,818,000. *Id.*

43. *E.g.*, Marc Edelman, *The Future of Amateurism After Antitrust Scrutiny: Why A Win for the Plaintiffs in the NCAA Student-Athlete Name & Likeness Licensing Litigation Will Not Lead to the Demise of College Sports*, 92 OR. L. REV. 1019, 1032 (2014) (“Thus, at a time when the NCAA executives, college presidents, athletic directors, and coaches have all become exceedingly wealthy, many student-athletes remain poor.”); Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 75–77 (2006); Taylor Branch, *The Shame of College Sports*, ATLANTIC (Sept. 7, 2011), [http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/?single\\_page=true](http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/?single_page=true).

44. *E.g.*, Darren Rovell, *NCAA holds firm: No pay for play*, ESPN (Dec. 11, 2013), [http://espn.go.com/college-sports/story/\\_/id/10119750/ncaa-president-mark-emmert-insists-pay-play-model-coming](http://espn.go.com/college-sports/story/_/id/10119750/ncaa-president-mark-emmert-insists-pay-play-model-coming).

45. *See, e.g.*, Ron Morris, *No Need to Pay College Athletes*, THE STATE, (Jan. 25, 2014) (article no longer available online); Jon Solomon, *Pell Grants for Players: Division I Athletes in Alabama got \$4.8 Million in need-based aid*, AL.COM (Apr. 10, 2014), [http://www.al.com/sports/index.ssf/2014/04/pell\\_grants\\_for\\_players\\_divisi.html](http://www.al.com/sports/index.ssf/2014/04/pell_grants_for_players_divisi.html).

46. *See* Christopher Davis, Jr. & Dylan Oliver Malagrino, *The Myth of the “Full Ride”: Cheating Our Collegiate Athletes and the Need for Additional NCAA Scholarship-Limit Reform*, 65 OKLA. L. REV. 605 (2013).

47. Ramogi Huma & Ellen J. Staurowsky, *The \$6 Billion Heist: Robbing College Athletes Under the Guise of Amateurism*, NAT’L COLL. PLAYERS ASS’N (2012), available at <http://www.ncpanow.org/news/articles/body/6-Billion-Heist>

Many athletes fail to graduate.<sup>48</sup> These arguments take on a race and class dimension as well, since the NCAA's amateurism policy is particularly harmful to athletes who are recruited out of poverty and who, owing to systemic discrimination, have lacked access to educational resources prior to attending college.<sup>49</sup>

Despite increasing public criticism,<sup>50</sup> the NCAA has been unwilling to undertake significant reform as a voluntary matter.<sup>51</sup> Its policies continue

Study\_Full.pdf; Sarah Ganim, *CNN Analysis: Some college athletes play like adults, read like fifth-graders*, CNN (Jan. 8, 2014), <http://www.cnn.com/2014/01/07/us/ncaa-athletes-reading-scores/>.

48. *Report: Football Players Graduate at Rates Lower Than Non-Athletes*, INSIDE HIGHER ED (Sept. 27, 2013), <http://www.insidehighered.com/quicktakes/2013/09/27/report-football-players-graduate-rates-lower-non-athletes#sthash.NB4NxgwW.t9xFbsBn.dpbs>; see also BILLY HAWKINS, *THE NEW PLANTATION: BLACK ATHLETES, COLLEGE SPORTS, AND PREDOMINANTLY WHITE NCAA INSTITUTIONS* 18 (2010) (questioning whether universities' multi-million dollar investments in academic support centers are actually investments in "academic evasion centers."); *id.* at 71–73 (discussing exploitation through miseducation, including the clustering of black athletes in watered-down majors that aim not to educate athletes but simply to keep them eligible under the NCAA's academic standards).

49. Amy Christian McCormick & Robert A. McCormick, *Race and Interest Convergence in NCAA Sports*, 2 WAKE FOREST J. L. & POL'Y 17, 24–25 (2012) ("In this way, the NCAA amateurism regime—in which free market principles determine compensation for coaches and all other economic beneficiaries of college sports, but not for athletes—replicates the apartheid-like systems that have existed throughout history and under which members of the racial majority have exploited the labor of minorities for entertainment and profit."); see also Erin Buzuvis, *Title IX Feminism, Social Justice, and NCAA Reform*, 5 FREEDOM CENTER J. 101, 112–114 (2014); Branch, *supra* note 43 (ascribing to the NCAA's amateurism rules, "an unmistakable whiff of a plantation"); HAWKINS, *supra* note 48, at 14–15.

50. See, e.g., Doug Bandow, *End College Sports Indentured Servitude: Pay "Student Athletes"*, FORBES, Feb. 21, 2012, available at <http://www.cato.org/publications/commentary/end-college-sports-indentured-servitude-pay-student-athletes>; Branch, *supra* note 43; Frank Deford, *Bust the Amateurism Myth*, CHRON. OF HIGHER EDUC. (Dec. 11, 2011), <http://chronicle.com/article/NCAA-Frank-Deford/130058/>; Boyce Watkins, *Is the NCAA Racist or Just Getting Rich?* BLACK VOICES (Aug. 4, 2009) (article no longer available online); Michael Wilbon, *College athletes deserve to be paid*, ESPN (July 18, 2011), [http://espn.go.com/college-sports/story/\\_/id/6778847/college-athletes-deserve-paid](http://espn.go.com/college-sports/story/_/id/6778847/college-athletes-deserve-paid); see also Staurowsky, *supra* note 5, at 578–80 (noting and documenting public attention to the pay-for-play debate). While noting the recent flurry of commentary calling for student athlete compensation, it is important to note that scholars and commentators have been calling for such reform for many years. Rodney K. Smith, *An Academic Game Plan for Reforming Big-Time Intercollegiate Athletics*, 67 DENV. U. L. REV. 213, 225–227 (1990) (presenting arguments for rejecting continued adherence to amateurism value in college athletics); see also Seth Davis, *Should College Athletes Be Paid? Why They Already Are*, SPORTS ILLUSTRATED, (Sept. 21, 2011), <http://www.si.com/more-sports/2011/09/21/branch-rebuttal> (citing commentator's criticism of amateurism from 1905).

51. To be sure, there have been some examples and attempts at reform. In 2011, the NCAA briefly allowed Division I members to offer a \$2000 cost of living stipend to athletes on full scholarship, to better reflect the true cost of attendance. NCAA



to hold athletes to an amateur ideal, yet permit member institutions to run athletic departments as commercial enterprises that put revenue generation ahead of athletes' personal and academic welfare.

### C. Legal Challenges to NCAA Amateurism Policy

In light of the NCAA's reluctance to change its position on athletes' amateur status, present and former student athletes are seeking to leverage the law in ways that would compel the NCAA to abandon the status quo in favor of some manner of freedom for athletes to capitalize on their market value. Both labor law and antitrust law have been the subject of such efforts, as described below.

#### 1. Labor Law Challenge: Are College Athletes "Employees" Under the NLRA?

In January 2014, present and former college athletes created the College Athletes Players Association, a labor organization seeking to advocate for the rights and safety of college athletes through the means of collective bargaining. Though CAPA is a new organization, it is an outgrowth of a well-established advocacy organization, the National College Player Association, which was founded in 2001 and is lead by former UCLA football player, now activist, Ramogi Huma.<sup>52</sup> Additionally, CAPA is receiving financial support from the United Steelworkers, the largest labor union in the United States.<sup>53</sup>

Soon after creating CAPA, Huma and Kain Colter, a quarterback from Northwestern University (since graduated), petitioned the National Labor Relations Board for the right to hold an election to authorize CAPA as the representative of Northwestern University football players in collective bargaining with the university.<sup>54</sup> CAPA's expressed objective is to negotiate on players' behalves for health insurance that would cover medical expenses for injuries sustained during competition.<sup>55</sup> The petition,

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members voted to rescind the plan, with many citing concerns that stipends were prohibitively expensive to administer in a gender equitable manner. *NCAA Shelves \$2000 Athlete Stipend*, ESPN (Dec. 16, 2011), [http://espn.go.com/college-sports/story/\\_/id/7357868/ncaa-puts-2000-stipend-athletes-hold](http://espn.go.com/college-sports/story/_/id/7357868/ncaa-puts-2000-stipend-athletes-hold).

52. See *Who We Are*, COLL. ATHLETES PLAYERS ASS'N, <http://www.collegeathletespa.org/about> (last visited Mar. 13, 2015); *About NCPA*, NAT'L COLLEGE PLAYERS ASS'N, <http://www.ncpanow.org/about> (last visited Feb. 4, 2015).

53. See *What We're Doing*, COLL. ATHLETES PLAYERS ASS'N, <http://www.collegeathletespa.org/what> (last visited Feb. 04, 2015).

54. Tom Farrey, *Kain Colter Starts Union Movement*, ESPN (Jan. 28, 2104), [http://espn.go.com/espn/otl/story/\\_/id/10363430/outside-lines-northwestern-wildcats-football-players-trying-join-labor-union](http://espn.go.com/espn/otl/story/_/id/10363430/outside-lines-northwestern-wildcats-football-players-trying-join-labor-union).

55. CAPA's website, for example, lists "[g]uaranteed coverage for sports-related

filed with the Board's regional office in Chicago, was accompanied by a stack of union authorization cards signed by Colter's teammates.<sup>56</sup> Northwestern, the petitioners' putative employer, challenged the petition, arguing that college football players are not employees within the meaning of the National Labor Relations Act, and thus do not have rights under the statute to engage in collective bargaining.<sup>57</sup> In February of 2014, the Board held a hearing at which players and coaches provided testimony on the question of whether the athletes constitute employees under the law.<sup>58</sup>

In March, the Board's Regional Director concluded that the Northwestern players were statutory employees and granted their petition for a representation election<sup>59</sup> (that election has since taken place, though the result remains impounded pending the outcome of Northwestern's appeal to the full NLRB). In reaching this conclusion, the Director focused his analysis on the common law definition of employee, which courts have recognized as being incorporated into the NLRA. Under this definition, an employee is a person who performs services for another while subject to the other's control, and in return for payment.<sup>60</sup> The Director thus organized his analysis around the fundamental elements of compensation for services and control.

As to compensation for services, the Director found evidence of a quid pro quo exchange between the football players' labor and the scholarships they receive. Scholarships, of course, have economic value—which the Director found to exceed \$76,000 per year taking into account tuition, fees,

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medical expenses for current and former players" first on its list of goals. *See What We're Doing*, COLL. ATHLETES PLAYERS ASS'N, <http://www.collegeathletespa.org/what> (last visited Feb. 04, 2015).

56. The law requires union authorization cards from 30% of members of the proposed bargaining unit, so presumably the petition was accompanied by at least 26 petitions (30% of 85). Gregg E. Clifton & Shawn N. Butte, *College Athletes: Students or Employees?*, COLLEGE & PROFESSIONAL SPORTS LAW, (Feb. 8, 2014), <http://www.collegeandprosportslaw.com/collegiate-sports/college-athletes-students-or-employees/>.

57. 29 U.S.C. § 157 (2014) ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . .").

58. *Kain Colter Testifies at NLRB Hearing*, ESPN (Feb. 18, 2014), [http://espn.go.com/chicago/college-football/story/\\_/id/10476031/northwestern-qb-kain-colter-testifies-bid-form-college-athlete-union](http://espn.go.com/chicago/college-football/story/_/id/10476031/northwestern-qb-kain-colter-testifies-bid-form-college-athlete-union).

59. Northwestern Univ. & Coll. Athlete Players Ass'n, N.L.R.B. No. 13-RC-121359 (Reg. 13 Mar. 26, 2013), *available at* <http://mynlrb.nlr.gov/link/document.aspx/09031d4581667b6f>.

60. *See* N.L.R.B. v. Town & Country Electric, 516 U.S. 85, 94 (1995); *Brown Univ. & Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW AFL-CIO*, 342 N.L.R.B. 483, 490 n.27 (2004).

room, board and books.<sup>61</sup> Northwestern requires its players to sign a tender agreement, which to the Director's mind operated as an employment contract because it details the conditions under which the player would not continue to receive his scholarship,<sup>62</sup> such as engaging in misconduct or violating an eligibility requirement imposed by the NCAA.<sup>63</sup> Scholarships can also be canceled if the player decides to withdraw from the team or fail to satisfy obligations to attend practices and games. These conditions convinced the Director that scholarships amounted to compensation in exchange for performance.<sup>64</sup>

The Director next described how scholarship football players at Northwestern were subject to the university's control in ways that distinguished them from other students. Most obviously, such control takes the form of intense demands on the players' time. Pre-season and in-season itineraries established that players were required to commit as much as 60 hours per week to team-related duties.<sup>65</sup> Control also takes the form of discipline, which coaches impose on players who violate team rules. Many of these rules restrict players' private lives that other students do not face, including rules that require a coach's permission to make living arrangements, apply for outside employment, drive their own cars, travel off campus, post items on the Internet, speak to the media, use alcohol and drugs, or engage in gambling.<sup>66</sup> Finally, the university exhibited control over the players' academic engagements, by mandating study hours and tutoring and requiring their participation in a professional development program. The fact that players may benefit from these requirements does not detract from the fact that, as mandatory conditions for staying on the team—and thus remaining eligible for scholarship—they demonstrate high and unique levels of control.

The Director made one additional conclusion regarding the petitioners' employment status, which was to distinguish them from the graduate student assistants who the NLRB determined in 2004 were not statutory employees, even though they received financial assistance to attend the university in exchange for teaching and research services.<sup>67</sup> In the case of the graduate student assistants, both the services they performed and the

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61. Northwestern Univ. & Coll. Athlete Players Ass'n, N.L.R.B. No. 13-RC-121359 (Reg. 13 Mar. 26, 2013), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d4581667b6f>.

62. *Id.*

63. *Id.* at 4.

64. *Id.* at 15.

65. *Id.* The Director cited players' testimony establishing a time commitment of 40 to 50 hours in season and 50 to 60 hours during pre-season. *Id.*

66. *Id.*

67. *Northwestern Univ.*, No. 13-RC-121359 at 18 (citing *Brown Univ.*, 342 N.L.R.B. 483 (2004)).

compensation they received were related to the academic purpose of the institution, such that the overall relationship between the graduate students and the university was “primarily and educational one”<sup>68</sup> rather than an employment one. In contrast, Northwestern football players are not “primarily” students; the services they provide to the university for as much as 60 hours a week are not academic in nature, being neither credit-bearing nor supervised by the university faculty.<sup>69</sup>

While the Regional Director’s analysis may have supported his conclusion that the Northwestern football players were employees under the NLRA, the Director’s conclusion is hardly the final word. As of this writing, Northwestern is appealing the decision to the full National Labor Relations Board in Washington, D.C., which typically applies a de novo standard of review rather deferring to the findings of lower-level agency decision makers. It is expected that the outcome either way will thereafter be appealed to federal court.

If the Northwestern plaintiffs prevail on appeal and the Director’s decision is upheld by the full NLRB and the federal courts, the direct impact will be that scholarship football players at Northwestern University may elect to be represented by CAPA and engage in collective bargaining with the university.<sup>70</sup> But practically speaking, the ramifications will be even more widespread, as a victory for the Northwestern plaintiffs will inspire athletes at other institutions to similarly petition for the right to unionize. These petitioners would prevail as long the programs they represent are factually similar to that of Northwestern in the degree to which players are compensated and subject to their university’s control. Public institutions are not covered by the NLRA, so the NLRB cannot authorize collective bargaining there. However, the precedent of its Northwestern decision could influence the courts who interpret state labor laws that do govern public sector unions. Additionally, given that public and private schools compete against each other on the field and in the market for athletic talent, public institutions would likely feel pressure to match whatever benefits the private sector unions successfully bargain for.

CAPA has stated that the benefit it is seeking to obtain through

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68. *Id.*

69. *Id.* at 18–20.

70. These petitions would also force the NLRB to sort of questions pertaining to the scope of the appropriate bargaining unit, which are as-yet unaddressed. It also appears that the Director’s decision may have renewed focus on the question of whether athletes are employees under other laws as well. For example, a class-action lawsuit filed in October of 2014 alleges that the NCAA and its Division I member institutions are violating the Fair Labor Standards Act in failing to pay athletes the federal minimum wage. Steve Berkowitz, *New LawsUIT Targets NCAA and Every Division I School*, USA TODAY, Oct. 23, 2014, <http://www.usatoday.com/story/sports/college/2014/10/23/ncaa-class-action-lawsuit-obannon-case/17790847/>.

collective bargaining is comprehensive health insurance for its members, so that players injured during their college participation will not have to endure out-of-pocket expenses after they graduate.<sup>71</sup> CAPA also advocates for multi-year scholarships which, while already the norm at Northwestern, are not necessarily standard at other institutions despite being permitted by NCAA rules. CAPA could even seek to bargain for benefits presently prohibited by the NCAA's amateurism rules, since the NLRA contains no exemption for an employer's refusal to bargain on the grounds of restrictions on the employer resulting from their voluntary membership in an association such as the NCAA. To this end, CAPA could attempt to bargain for cost of living stipends, an educational trust fund to help players who graduate on time defray the cost of education, or even (though CAPA has not publically supported for this) market-driven compensation, i.e., salary.<sup>72</sup> If demand for CAPA-represented players is strong enough, CAPA could leverage its collective bargaining power to pressure the NCAA to change the rules to allow its member institutions to meet the union's demands. It is also possible that CAPA might find the newly-autonomous Power Five conferences willing to implement many of their demands regardless of whether the union is able to exert collective bargaining pressure.<sup>73</sup>

## 2. Antitrust Challenges: Are NCAA Bans on Player Competition Unlawful Restraints on Trade?

In 2009, former UCLA basketball star Ed O'Bannon filed a lawsuit against the NCAA on behalf of a class of former athletes whose names, images, and likenesses appeared in television broadcasts and in video games to the financial benefit of their universities as well as the NCAA.<sup>74</sup> The lawsuit challenged various NCAA policies that prohibit athletes from receiving compensation for the use of their names, images, and likenesses. These included policies that limit what universities can provide to athletes

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71. Jeremy Fowler, *Players as Employees? High Cost of College Football Unions Is in Millions*, CBS SPORTS (Apr. 21, 2014), <http://www.cbssports.com/collegefootball/eye-on-college-football/24534813/players-as-employees-high-costs-of-college-football-union-is-in-millions>.

72. *Id.*

73. Steve Eder, *How New N.C.A.A. Rules Will Work*, N.Y. TIMES, Aug. 8, 2014, [http://www.nytimes.com/2014/08/08/sports/ncaaf/football/how-new-ncaa-rules-will-work-or-not.html?\\_r=0](http://www.nytimes.com/2014/08/08/sports/ncaaf/football/how-new-ncaa-rules-will-work-or-not.html?_r=0) (predicting that the Power Five conferences will improve medical coverage and offer more robust and multi-year scholarships).

74. Marc Edelman, *The District Court Decision in O'Bannon v. National Collegiate Athletic Association: A Small Step Forward for College Athlete Rights and a Gateway for Far Grander Change*, 71 WASH. & LEE L. REV. 2319 (2014). For more details generally on the procedural history of the O'Bannon lawsuit, *see generally id.* at Part I.

as part of their athletic grant-in-aid, as well as those that required athletes to relinquish “in perpetuity” the right to license for commercial purposes the use of their names, images and likenesses as associated with their participation in college athletics.<sup>75</sup> The plaintiffs argue that these restrictions on athletes’ compensation amount to an unreasonable restraint on trade that, as such, violates the Sherman Antitrust Act.<sup>76</sup>

O’Bannon’s case<sup>77</sup> was assigned to Judge Claudia Wilken of the U.S. District Court for the Northern District of California, who eventually<sup>78</sup> held a bench trial in June of 2014. Her ruling of August 8 concluded that the NCAA’s denial of players’ rights to capitalize on their own names, images and likenesses violated antitrust law. In reaching this conclusion, Judge Wilken employed the established burden-shifting approach for unreasonable restraint cases.<sup>79</sup> First, a plaintiff must demonstrate that the defendant’s conduct amounts to a significant restraint on trade in a particular market. When a plaintiff satisfies that burden, the defendant must then prove that the restraint is justified by a pro-competitive purpose. If the defendant succeeds, the plaintiff can still prevail by establishing that the defendant could accomplish that purpose by employing a means that are less restrictive.

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75. NCAA Form 08–3a; NCAA BYLAWS, art. 12.5.1.1, *reprinted in* NCAA MANUAL, *supra* note 10, at 68; O’Bannon v. NCAA, Nos. C09-1967 CW, C09-3329 CW, C09-4882 CW, 2010 WL 445190 at \*1 (N.D. Cal. Feb. 8, 2010).

76. 15 U.S.C. § 1 (2014) (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”).

77. O’Bannon’s case was consolidated with other similar cases, which resulted in the addition a second group of plaintiffs that used a different theory of liability, namely violation of their right of publicity, to challenge the NCAA and other defendants’ licensing practices. However, the NCAA settled with the right of publicity plaintiffs in June of 2014. Other original and later-added defendants, namely, Electronic Arts and the Collegiate Licensing Corporation have also settled all claims. Michael McCann, *NCAA Reaches Settlement with Keller Plaintiffs: What Does It Mean?* SPORTS ILLUSTRATED (JUNE 9, 2014), <http://www.si.com/college-football/2014/06/09/ncaa-keller-lawsuit-settlement>.

78. In the run-up to the trial, the judge denied the NCAA’s motions to dismiss and for summary judgment. *See* In re NCAA Student-Athlete Name & Likeness Licensing Litig., No. C 09-1967 CW, 2014 WL 1410451, at \*17–18 (N.D. Cal. Apr. 11, 2014) (as well as other various pre-trial motions).

79. Antitrust plaintiffs have two avenues for satisfying the unreasonableness requirement. Some types of agreements, like price fixing agreements among competitors, are deemed “per se” unreasonable, and thus automatically constitute illegal restraints on trade. For other agreements not governed by the “per se” rule, the courts will use a “rule of reason” test, which asks whether the restraints’ harm to competition is outweighed by procompetitive effects. Judge Wilken ruled that the plaintiffs in this litigation will have to satisfy the rule of reason, because the per se rule does not apply to agreements between and among the NCAA, CLC, and licensees, who were not horizontal competitors engaging in price fixing. O’Bannon v. NCAA, 7 F. Supp. 3d 955, 985 (N.D. Cal. 2014).

In *O'Bannon*, the plaintiffs satisfied their initial burden by proving that the NCAA's suppression of athletes' and former athletes' rights to license their own names, images and likenesses restrains trade in two discrete markets: the market for college education and the market for group licenses. The judge agreed that, absent the NCAA's restraint, top recruits in football and men's basketball could bargain with colleges and universities to receive some form of compensation derived from the licensing of their names, images and likenesses. The restraint, therefore, operates as a price-fixing agreement among those (colleges and universities) who are in the market to "purchase" the athletic talent of students who are recruited to play.<sup>80</sup> Additionally, Judge Wilken found, the NCAA's ban on athlete compensation ensures that colleges and the conferences they belong to can enter into licensing agreements with television broadcasters and other users of athletes' names, images and likenesses (namely, video game producers) without having to compete with the athletes themselves. If the NCAA did not restrict the athletes from doing so, they would otherwise be in a position to collectively (via a group license) undercut the license fees that individual universities and conferences charge to broadcast or otherwise use the athletes' names, images and likenesses.

Having concluded that the plaintiffs satisfied their initial burden, the court then considered the NCAA's various arguments that the challenged restraints serve some procompetitive purpose,<sup>81</sup> ultimately concluding that two of the NCAA's proposed justifications satisfied the defendant's burden at this stage of the inquiry. The NCAA argued that foreclosing athletes' compensation for their names, images, and likenesses is justified by the need to maintain the NCAA's tradition of amateurism, which in turn, ensures that the NCAA's product is distinct from that offered by professional sports. While there was no evidence to suggest that a

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80. As Judge Wilken points out, an agreement among buyers to only buy at a certain price (a monopsony) is just as much price-fixing as an agreement among sellers to only sell at a certain price (a monopoly). *O'Bannon*, 7 F. Supp. 3d at 993. It is also possible to look at colleges and universities as those in the business of selling the college-athletic experience. In this light, the restraint on players' rights to capitalize on their names, images, and likenesses is built into the price of selling that experience, and thus may be seen as monopolistic price-fixing as well. *Id.*

81. The NCAA had offered an additional argument that was dismissed prior to trial for lacking a sufficient evidentiary basis to survive summary judgment. In *Re NCAA Student-Athlete Name and Likeness Licensing Litigation*, C 09-1967 CW, 2014 WL 1410451, at \*16 (N.D. Cal. Apr. 11 2014). Specifically, the judge rejected that the restraints on athletes' compensation are necessary to ensure that athletic programs can provide adequate support non-revenue sports, including women's sports. There was no evidence, she reasoned, to suggest why the NCAA couldn't lift the restraint but still implement rules that would ensure those sports are protected. For example, the NCAA could require member institutions to distribute some portion to licensing revenue to non-revenue sports. *Id.*

“sweeping prohibition” on such compensation was necessary to ensure a market for amateur athletics, the court agreed that *some* upper limit on athlete compensation was justified by this rationale.<sup>82</sup>

The court also agreed that restricting athletes’ compensation to some degree was justified by the NCAA’s goal of ensuring that college athletes are integrated into their academic communities. Though the court rejected that this goal justified the blanket restriction on athletes’ compensation for the use of their names, images, and likenesses—indeed, some compensation could provide some students with the means to focus more of their attention on academics—the court agreed that some limits on athletes’ compensation could be justified by the wedge that money would drive between athletes and other students.<sup>83</sup>

The court rejected others of the NCAA’s procompetitive arguments, however. The court concluded that the NCAA failed to prove that its desire for competitive balance among teams justifies its restraints on athlete compensation. The NCAA did not provide any evidence that restricting athletes’ compensation actually promotes competitive balance, and even if it did, the court acknowledged that any such effect would be neutralized by the lavish spending that some athletic programs spend on facilities, amenities, and the salaries of their coaches.<sup>84</sup> Along similar lines, the court rejected the idea that foreclosing athlete compensation was necessary to increase “outputs”—i.e., teams, and thus, games—by attracting more schools to join the NCAA and by lowering the financial burden of doing so. The court found no credible evidence that colleges and universities were attracted to the NCAA because of its ban on athlete compensation, or that changing the rules would have significant impact on its membership.<sup>85</sup>

Since restraining athletes’ compensation serves, at least in part, to ensure a market for distinctly amateur athletics and to promote athletes’ academic integration, the court considered the NCAA’s burden to be satisfied and looked to the plaintiffs to prove that a less restrictive approach could as effectively serve the same goals. The court agreed with two of the plaintiffs’ proposed alternatives to the blanket restriction on athlete compensation: first, the NCAA could allow colleges and universities to use licensing revenue to provide athletes with stipends that would make up any difference between the true cost of attendance and the grants-in-aid to tuition, room and board, and books.<sup>86</sup> Because the stipends athletes would receive in this model could be used for school supplies and educational expenses, this less-restrictive alternative would still ensure amateurism and

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82. *O’Bannon*, 7 F. Supp. 3d. at 999.

83. *Id.* at 1003.

84. *Id.* at 1002.

85. *Id.* at 1004.

86. *Id.* at 1005.



promote academic integration.<sup>87</sup>

Second, the court agreed that the NCAA as an alternative could allow colleges and universities to divert some of the proceeds they receive from licensing athletes' names, images, and likenesses to a trust from which athletes would be compensated once they are no longer enrolled.<sup>88</sup> The court found that such a policy would not hurt consumer demand for the NCAA's product so long as the payments were limited in amount (the court endorsed \$5000 as an upper limit to this amount, based on the absence of evidence that payments that low would harm the market for college athletics<sup>89</sup>) and distributed by equal shares to all members of the team.<sup>90</sup> Delaying payment until after their time in college would ensure that payments did not impair the athletes' education by separating them from the rest of the student body.<sup>91</sup>

As the court concluded that both of these less-restrictive alternatives support the NCAA's procompetitive justifications for restricting athletes' compensation, the court issued a two-part injunction against the NCAA that will require the association to modify its amateurism policy. The injunction first prevents the NCAA from enforcing any rules that would "prohibit its member schools and conferences from offering their FBS football and Division I [men's] basketball recruits a limited share of the revenues generated from the use of their names, images, and likenesses, in addition to a full grant-in-aid."<sup>92</sup> However, the injunction expressly permits the NCAA to cap such payments at true cost of attendance as defined by the NCAA. Secondly, the injunction prohibits the NCAA from enforcing any rules that would "prevent its member schools and conferences from offering to deposit a limited share of licensing revenue in trust for their FBS football and Division I [men's] basketball recruits, payable when they leave school or their eligibility expires."<sup>93</sup> This aspect of the injunction permits the NCAA to cap the amount of money that may

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87. *Id.* at 983.

88. *Id.* at 1005-06.

89. The court also noted the testimony of the NCAA's own witness that he "would not be troubled" by payments of \$5000, as well as that of Stanford athletic director that concern for set in at compensation levels of "six figures." *Id.* at 983. The court also acknowledged the findings of the NCAA's expert who conducted a survey on attitudes regarding college sports. 38% of the survey's respondents would be less likely to watch or attend college football and basketball games if athletes were paid \$20,000 or more, and 47% would be less likely to watch or attend games if athletes were paid more than \$50,000. *Id.* at 975-76. From this, the expert concluded that the smaller the degree of athlete compensation, the less of an effect it would have on the popularity of college sports. *Id.* at 983.

90. *Id.* at 983.

91. *Id.*

92. *Id.* at 1008.

93. *Id.*

be held in trust, though that cap may not be less than five thousand dollars “for every year that the student-athlete remains academically eligible to compete.”<sup>94</sup> The NCAA has filed its intention to appeal this decision to the U.S. Court of Appeals for the Ninth Circuit.<sup>95</sup>

While the NCAA challenges the district court’s ruling on appeal, it must simultaneously defend additional antitrust litigation that has since been filed to challenge NCAA’s ban on athlete compensation beyond the context of licensing revenue. Some athletes, including West Virginia University’s Shawne Alston, have sued the NCAA and the powerful Division I conferences SEC, ACC, Big 12, Pac-12 and Big Ten, arguing that restraining colleges from compensating athletes for the true cost of attendance is an unlawful restraint on trade.<sup>96</sup> Separately, Clemson’s Martin Jenkins, through his attorney, antitrust lawyer Jeffrey Kessler,<sup>97</sup> filed an antitrust challenge targeting more generally the NCAA’s ban on athlete compensation. Alston’s and Jenkins’s lawsuits, along with others of a similar nature, have been consolidated and assigned to Judge Wilkens, the same judge that ruled against the NCAA in the *O’Bannon* case.<sup>98</sup> An absolute victory in Jenkins’s case would prohibit the NCAA from enforcing any limits on compensation that NCAA member institutions can offer to their athletes and shift the college recruiting process to a free market paradigm.<sup>99</sup> It is also possible to imagine various partial victories, however, if the judge determines—as she did in *O’Bannon*—that some upper limit on athlete compensation is justified by one of the NCAA’s procompetitive arguments, such as to promote athletes’ academic integration, to retain a marketable distinction between the NCAA’s product and professional sports, or to ensure competitive equity among programs. While the latter of these arguments was rejected by Judge Wilken in *O’Bannon*, it is possible that the NCAA could perhaps more persuasively defend in the context of a lawsuit aimed at removing all limits on athlete compensation, as opposed to just the revenue derived from athletes’ names

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94. *Id.*

95. *NCAA Files Appeal of O’Bannon Ruling*, ESPN (Aug. 21, 2014), [http://espn.go.com/college-football/story/\\_/id/11387865/ncaa-files-intent-appeal-obannon-decision](http://espn.go.com/college-football/story/_/id/11387865/ncaa-files-intent-appeal-obannon-decision).

96. *Shawne Alston Suing NCAA, Others*, ESPN (Mar. 6, 2014), [http://espn.go.com/college-football/story/\\_/id/10558893/ncaa-conferences-sued-scholarship-value](http://espn.go.com/college-football/story/_/id/10558893/ncaa-conferences-sued-scholarship-value).

97. Steve Eder, *A Legal Titan of Sports Labor Disputes Sets His Sights on the N.C.A.A.*, N.Y. TIMES, Aug. 27, 2014, <http://www.nytimes.com/2014/08/28/sports/jeffrey-kessler-envisions-open-market-for-ncaa-college-athletes.html>.

98. Jon Solomon, *Judge Draws NCAA Doubleheader with O’Bannon, Scholarship Cases*, CBS SPORTS (June 17, 2014), <http://www.cbssports.com/college-football/writer/jon-solomon/24590912/judge-draws-ncaa-doubleheader-with-obannon-scholarship-cases>.

99. See Edelman, *supra* note 43, at 1054–55.

and likenesses. In sum, while the legal ramifications of the district court ruling in *O'Bannon* remain to be seen, the case certainly creates potential for a wide range of restrictions on the NCAA's amateurism policy as it stands today.

## II. APPLYING TITLE IX TO AMATEURISM REFORM

As described in the section above, college athletics may soon be compelled by law to modify its amateur paradigm. Unless either defendant successfully appeals *Northwestern* or *O'Bannon*, some players will be able to capitalize on the market demand for their participation in college athletes, whether by sharing somehow in the proceeds of broadcasts and other endeavors that use their names, images, and likenesses, or by harnessing their collective bargaining power to obtain some form of compensation or other benefits above and beyond what the NCAA currently permits as part of athletics grant-in-aid. This Part will identify the possible outcomes that could result directly or indirectly from the above-mentioned litigation, and analyze the implications for Title IX.

### A. The Right to Engage in Collective Bargaining

The NLRB's ruling, if upheld on appeal, only applies directly to scholarship football players at Northwestern University—and not even all Northwestern football players at that. The Director's decision singled out for exclusion from his ruling non-scholarship or “walk-on” players, who do not receive a scholarship as compensation for services and who are not as restricted as scholarship players from engaging in academic pursuits. In making the distinction even among players on the same team, the Director clearly signaled that not all college athletes are employees under the NLRA. Going forward, therefore, the degree to which the decision could be relied upon in support of other athletes' rights to engage in collective bargaining<sup>100</sup> would depend on the similarity of those athletes' experience to those of the Northwestern football players, on the matters that influenced the Director's decision—namely, whether they provide services for compensation and are subject to institutional control.

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100. Athletes who persuade the NLRB that they are employees under the NLRA could theoretically elect to be represented by CAPA. It would be up to the NLRB to determine the appropriate bargaining unit for each successful petition, based on the community of interests among the unit's members. 29 U.S.C. § 159(b) (2014). Such an analysis would consider, among other factors, the degree to which athletes are similar in terms of “skills, interests, duties and working conditions.” *Kindred Nursing Ctrs. East, LLC v. N.L.R.B.*, 727 F.3d 552, 560 (6th Cir. 2013) (quoting *N.L.R.B. v. ADT Sec. Servs., Inc.*, 689 F.3d 628, 633 (6th Cir. 2012)).

### 1. Are female athletes subject to institutional control?

Female athletes in many big-time programs—in particular, basketball programs—could likely convince the NLRB that their lives are controlled by athletics to a degree comparable to that of Northwestern’s football players.<sup>101</sup> To this end, the Board would consider whether a women’s program is subject to a similar commitment of time and comparable regulations of their private lives and their academic pursuits. Some research by the NCAA suggests that at least in general, the time commitment for Division I women’s basketball (37.6 hours per week) is similar to that of men’s basketball (39.2 hours) and football (43.3 hours).<sup>102</sup> Female basketball players reported a slightly higher number of missed classes per week (2.5) than football players (1.7),<sup>103</sup> a result that is consistent with other independent research shows that male and female athletes perceive that athletics interfere with their academic work at similarly high rates—78% and 82% respectively.<sup>104</sup> A similar percentage of Division I female basketball players (16%) as FBS football players (17%) reported taking certain classes at the suggestion of their coaches<sup>105</sup> and choosing classes because they fit in with their practice schedule (47% of FBS football players and 45% of Division I women’s basketball players).<sup>106</sup> Though a contested petition to unionize would likely require the female athletes to show in the context of their particular program that the degree of institutional control is comparable, and could raise points of

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101. Male athletes in programs other than Northwestern’s football program would have to make this showing as well. This question would have to be decided on a case-by-case basis, based on the unique characteristics of each program. Though the implications of Northwestern decision on men’s nonrevenue sports are interesting and worthy of consideration, they are outside the scope of this Article which seeks to answer questions about the implications of the decision when viewed in concert with Title IX.

102. DIVISION I RESULTS FROM THE NCAA GOALS STUDY ON THE STUDENT-ATHLETE EXPERIENCE, NAT’L. COLL. ATHLETIC ASS’N., slide 17 (Nov. 2011), available at [http://www.ncaa.org/sites/default/files/DI\\_GOALS\\_FARA\\_final\\_1.pdf](http://www.ncaa.org/sites/default/files/DI_GOALS_FARA_final_1.pdf) (PowerPoint Presentation)[hereinafter *GOALS Study*]. Other women’s sports reported a smaller time commitment at 33.3 hours per week. *Id.*; see also Steve Wieburg, *NCAA Survey Delves Into Practice Time, Coaches’ Trust*, USA TODAY, Jan. 15, 2011, [http://usatoday30.usatoday.com/sports/college/2011-01-14-ncaa-survey\\_N.htm](http://usatoday30.usatoday.com/sports/college/2011-01-14-ncaa-survey_N.htm).

103. GOALS STUDY, *supra* note 102, at slide 22.

104. Josephine R. Potuto & James O’Hanlon, *National Study of Student-Athletes Regarding Their Experiences as College Students*, 41 C. STUDENT J. 947, 961 (2007).

105. GOALS STUDY, *supra* note 102, at slide 28. Interestingly, men’s basketball players had a significantly higher response than either women’s basketball or football, with 27%. *Id.* These questions also served to differentiate women’s basketball from the rest of women’s sports, as female athletes outside that sport were significantly less likely (only 6%) to have been influence by a coach in the selection of their classes. *Id.*

106. *Id.* On this issue, women’s basketball players and other female athletes were similarly constrained.

similarity that go beyond the scope of these data, the NCAA's and other's research at least provide the grounds on which to predict that such a showing could likely be made by female athletes in many Division I basketball programs.

## 2. Do female athletes provide services for compensation?

Next, female athletes petitioning to unionize would have to convince the NLRB that they provide services of comparable value to those provided by Northwestern's scholarship football players, for which they receive compensation. The Director's conclusion that the Northwestern football players satisfied this aspect of the statutory definition flowed from three findings: (1) athletic scholarships amounted to a "transfer of economic value" to the football players receiving them; (2) the existence of a quid-pro-quo relationship between the scholarship and a football players' athletic participation; and (3) that the university derives value from the football players' athletic participation.<sup>107</sup> Though female athletes are similarly situated with respect to the first and second of these reasons—the scholarships they receive are of similar value to those awarded to their male counterparts and are also conditioned on athletic participation<sup>108</sup>—they are, at least in many cases, distinguishable on the third. The Director found that Northwestern's football program produced \$235 million in revenue from 2003 to 2012, a number derived from ticket sales, broadcast contracts, and merchandise.<sup>109</sup> He also noted that the team incurred expenses of \$159 million over that time, resulting in a profit of \$76 million over nine years.<sup>110</sup> The Director also found that for the academic year 2012–13, the football program generated net revenue along the lines of \$8 million (when adjusted for the cost to maintain the stadium), and that the profit Northwestern generates from football is used to subsidize non-revenue generating sports.<sup>111</sup>

In context, however, the profitability of Northwestern's football team is not a characteristic shared even by most Division I football programs, let alone other men's sports and women's sports. For example, according to a 2013 report by the NCAA, 53% of Division I FBS<sup>112</sup> football programs and

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107. See *supra* Part I.C.1.

108. It is relevant that the Northwestern football players' scholarships provided a relatively high degree of "job security" compared to the majority of athletic scholarships that are awarded on a year to year basis. Yet the Director still recognized them as conditioned on the athletes' participation and compliance with team rules.

109. Northwestern Univ. & Coll. Athletes Players Ass'n., N.L.R.B. No. 13-RC-121359, at \*13 (Reg. 13 Mar. 26, 2013), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d4581667b6f>.

110. *Id.*

111. *Id.*

112. The NCAA report provided separate data for Division I schools whose

56% of men's basketball programs generated net revenue while only one women's basketball program in this category reported turning a profit. Of those profitable programs, the median net revenue for football programs was approximately \$11.5 million, for men's basketball programs, \$3.06 million, and for women's basketball, \$1.3 million.

Thus, to the extent the NLRB wanted to continue to rely on generated net revenue as an indicator of the value of an athletes' labor, it could exclude most female athletes (as well as those male athletes who participate in nonrevenue sports) from the statutory definition of employee. To prevail on this ground, female athletes would have to argue that the extent to which their efforts produce revenue is not a relevant consideration in the analysis of whether one is an employee for purposes of the NLRA. To this end, they could point out that other NLRB decisions examining the definition of employee emphasize wages-for-work, and do not dwell on the question of whether and the extent to which their services produce revenue.<sup>113</sup> On the other hand, there is NLRB precedent—namely, the Brown University case about graduate students—for excluding students from the definition of employee on the grounds that their relationship with the university is primarily educational. The Board may be more likely to conclude that the relationship between a university and a student whose efforts generate substantial revenue is not primarily educational and offer this as a principled way of distinguishing the status of athletes in non-revenue generating sports.

This factor therefore operates as the bigger roadblock for any efforts by female athletes to petition for eligibility to join CAPA or any other union for the purposes of collective bargaining. However, explained in the next Section, this outcome would not prevent female athletes from nevertheless benefiting from the union's collective bargaining.

#### B. Title IX's Application to Benefits Obtained Through Collective Bargaining

If the Regional Director's ruling certifying the football players' union

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football programs compete in the Bowl Championship Series (the Division I Football Bowl Subdivision, formerly Division I-A), those whose football programs compete in the NCAA Championship (the Division I Football Champion Subdivision, formerly Division I-AA) and those Division I schools without football program. It also reported data for Divisions II and III.

113. WBAI Pacifica Found., 328 N.L.R.B. 1273, 1275 (1999) (rejecting that claim that unpaid staff are employees under the NLRA because “[u]npaid staff do not receive compensation for their work at the station.”); Town & Country Elec. Inc., 309 N.L.R.B. 1250, 1253 (1992), *aff'd*, N.L.R.B. v. Town & Country Elec., Inc., 516 U.S. 85 (1995) (“As long as union organizers employed by or seeking work with an employer do so for wages in return for assigned work, they meet the standard dictionary definition of ‘employee.’”).

petition is upheld, CAPA will head to the bargaining table with Northwestern and likely, eventually, other private universities with similar athletic programs. As mentioned, the bargaining would likely ensue over various benefits including comprehensive health insurance, multi-year scholarships, and educational trust fund, stipends, or other compensation. The union's successful bargaining for any of these benefits would indirectly affect female athletes, even if they are not part of the union, because Title IX requires institutions to treat men's and women's sports equally in the aggregate.

### 1. Under Title IX, Separate Athletic Program Must Be Equal

Title IX is a federal statute passed in 1972 that simply prohibits discrimination on the basis of sex in federally funded educational institutions.<sup>114</sup> Title IX's application to college athletics—though initially contested by the NCAA<sup>115</sup>—was confirmed by Congress in 1987 when it amended the law to require Title IX's application to all of a covered institution's programs, including programs like athletics that don't directly receive federal funds.<sup>116</sup> Though the statutory mandate is vague, Title IX's implementing regulations, enforced by the Department of Education, clarify the statute's application to various contexts, including athletics.

Title IX's regulatory provision governing athletic programs is rather unique to civil rights law, in that it applies a separate-but-equal framework.<sup>117</sup> In contrast to most other aspects of education, athletics may permissibly be segregated by sex.<sup>118</sup> But, institutions must be able to demonstrate equality between the two programs in three general contexts: the number of opportunities they provide to members of each sex, the

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114. 20 U.S.C. §§ 1681 (2014). Because of its application to educational institutions, Title IX would not apply to compensation or benefits athletes received from third parties, such as commercial sponsors.

115. SMITH, *supra* note 3, at 147.

116. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (*codified at* 20 U.S.C. § 1687). This amendment to Title IX nullified *Grove City College v. Bell*, 465 U.S. 555 (1984), a Supreme Court decision holding that Title IX only prohibited sex discrimination within those programs that received federal funding, rather than institution-wide.

117. *See, e.g.,* Rebecca A. Kiselewich, Note, *In Defense of the 2006 Title IX Regulations for Single-Sex Public Education: How Separate Can Be Equal*, 49 B.C. L. REV. 217, 254 (2008) (“The ‘separate but equal’ doctrine has flown beneath the radar and continued to thrive in the realm of athletics, where Title IX is perhaps best known for prohibiting discrimination on the basis of sex.”).

118. Aside from athletics, Title IX's application to prison programs and single-sex classes may also be said to apply a separate-but-equal framework—in contrast to Title IX's application to other contexts like employment and admissions. *See id.*; Christine M. Safarik, *Constitutional Law - Separate but Equal: Jeldness v. Pearce - An Analysis of Title IX Within the Confines of Correctional Facilities*, 18 W. NEW ENG. L. REV. 337 (1996).

overall quality of the program, and the comparability of scholarship dollars awarded to athletes of each sex. With regard to the first matter, the Department of Education's well-known three-part test provides a flexible measure of equality in the number of opportunities: an institution must either demonstrate athletic opportunities proportionally to the gender breakdown of the student body, or be able to show historical and continuous program expansion for women (as the "underrepresented sex"), or be able to show that women's interests and abilities in athletics are fully satisfied by whatever lopsided distribution of athletic opportunities the institution presently maintains.<sup>119</sup>

The second aspect of equality examines the quality of those athletic opportunities made available to men's and women's programs in the aggregate. According to the Title IX regulations, an institution must ensure "equal treatment" in terms of such exemplary factors as facilities and equipment, practice and competition schedules, access to and quality of coaching, academic services, medical services, and publicity, among others.<sup>120</sup> To be clear, equal treatment does not require identical overall aggregate spending on men's and women's sports (though disparate expenditures will warrant a nondiscriminatory explanation).<sup>121</sup> Nor does equal treatment require athletic departments to offer identical benefits to men's and women's teams.<sup>122</sup> Differences that result from unique aspects of particular sports are, appropriately, permitted.<sup>123</sup> But the overall quality of the men's and women's programs must be equivalent. While it is permissible under these regulations to implement a tiering system under which some sports receive higher-quality resources than others, tiering must benefit a similar number of female as male athletes.<sup>124</sup> Athletic-based

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119. Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979) [hereinafter 1979 Policy Interpretation].

120. 34 C.F.R. § 106.41(c)(2)-(10) (2010).

121. *Id.* at § 106.41(c) ("Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.").

122. 1979 Policy Interpretation, *supra* note 119, at 71,415.

123. *Id.* For example, equal treatment does not require men's and women's programs to receive "the same" equipment, but rather, that men's and women's needs with respect to equipment are met to a comparable degree.

124. *Id.* at 71,422 ("[N]o subgrouping of male or female students (such as a team) may be used in such a way as to diminish the protection of the larger class of males and females in their rights to equal participation in educational benefits or opportunities. Use of the 'major/minor' classification does not meet this test where large participation sports (e.g., football) are compared to smaller ones (e.g., women's volleyball) in such a manner as to have the effect of disproportionately providing benefits or opportunities to



financial aid is also an aspect of equal treatment, as Title IX regulations requires that athletic-based financial aid be distributed proportionately to the number of students of each sex who are participating in athletics.<sup>125</sup>

## 2. Title IX Does Not Permit Unequal Treatment Arising from Market-Based Sexism

Title IX's regulations apply the concept of equality differently in the context of athletics than elsewhere in education.<sup>126</sup> For the most part, Title IX requires educational institutions to provide men and women with equality of opportunity, rather than equality of outcome.<sup>127</sup> For example, to the extent that Title IX applies to college admissions, or to employment, the law is satisfied when no one is turned away because of a sex-based exclusion or quota.<sup>128</sup> As long as men and women have an equal opportunity to compete for a spot in the entering class, or for a job on the faculty, a college or university is largely free<sup>129</sup> to apply neutral criteria—interest and ability, for example—even in ways that produce disproportionate outcomes.

If athletics worked the same way, then access to athletic opportunities could be similarly based purely on merit and interest. Title IX would be satisfied by allowing women to try out for the football team, regardless of whether any woman tried or succeeded to make the team. Pragmatically, however, the regulations' drafters recognized that such a standard would never produce more than hypothetical equality, since women's historical exclusion from athletics has suppressed their interests and abilities relative to men's.<sup>130</sup> And courts, for their own part, have rejected arguments that

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the members of one sex.”).

125. 34 C.F.R. 106.37(c) (2004).

126. *See, e.g.*, *Kelley v. Bd. of Trs.*, 35 F.3d 265, 270 (7th Cir. 1994) (recognizing Title IX's unique application to athletics, resulting from Congress's recognition that “athletics presented a unique set of problems not raised in areas such as employment and academics.”).

127. Kimberly A. Yuracko, *One for You and One for Me: Is Title IX's Sex-Based Proportionality Requirement for College Varsity Athletic Positions Defensible?*, 97 NW. U. L. REV. 731, 737–38 (2003) (“The drafters made clear that with respect to admissions, Title IX would require only formally equal treatment of women and men. Women and men would compete against each other on a ‘level playing field,’ one in which they were measured against the same set of criteria, for the same spots in the same academic programs.”).

128. *Id.*

129. In some contexts, Title IX prohibits conduct that is not intentionally discriminatory but that produces a disparate impact on the basis of sex. *See, e.g.*, David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J. L. & GENDER 217, 276–78 (2005) (discussing Title IX's incorporation of a disparate impact standard).

130. As Professor Brake explains, Title IX's application to athletics rejects a “liberal” feminist approach that would require equality for female athletes only so far as they are similarly situated to their male counterparts in terms of interest and ability.

male students' relatively higher interest in athletic participations justifies a disproportionate distribution of opportunities in their favor.<sup>131</sup>

Instead, the regulations require that an athletic program's participation *outcomes* are equalized—preserving opportunities and resources for female athletes without conditioning them on a demonstration of interest and ability. In this way, Title IX allows women to overcome the historical and contemporary social forces that, unmitigated, would continue to constrain their opportunities.

Consistent with this reasoning, judicial and regulatory interpretations of Title IX's equal treatment mandate foreclose an institution from defending a disparity on grounds tracing back to third-party or market-based sexism. For one example, high school boys' teams often have active and generous booster clubs that donate resources and amenities.<sup>132</sup> These donations may, and frequently do, produce an unequal outcome wherein some male athletes have access to higher quality equipment, a better facility, or other perks that no female athletes have access to. OCR has clearly stated that schools cannot use the fact that they relied on donated funds as a defense for unequal treatment.<sup>133</sup> In a 1995 opinion letter, OCR explained that “private funds . . . , although neutral in principle, are likely to be subject to the same historical patterns that Title IX was enacted to address.”<sup>134</sup> The equal treatment mandate “could be routinely undermined” if third-party sexism provided a defense.<sup>135</sup>

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Deborah L. Brake, *Title IX As Pragmatic Feminism*, 55 CLEV. ST. L. REV. 513, 537 (2007). Instead, Title IX's separate-but-equal approach incorporates a “substantive equality/accommodation model” that, like affirmative action, “justif[ies] gender-conscious treatment as a way of ensuring meaningful athletic opportunities for women.” *Id.*

131. Neal v. Bd. of Trs. of Cal. State Univs., 198 F.3d 763, 767–69 (9th Cir. 1999); Cohen v. Brown Univ., 101 F.3d 155, 174 (1st Cir. 1996); Kelley v. Bd. of Trs., 35 F.3d 265, 270 (7th Cir. 1994); Cohen v. Brown Univ., 991 F.2d 888, 899 (1st Cir. 1993); Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 830 (10th Cir. 1993). In rejecting the relative interest theory, these courts necessarily read Title IX's three-part test as going beyond a formal equality approach that would require equal treatment only so long as women and men are similarly situated in terms of interest and ability. Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13, 56 (2001).

132. See Erin E. Buzuvis & Kristine E. Newhall, *Equality Beyond the Three-Part Test: Exploring and Explaining the Invisibility of Title IX's Equal Treatment Requirement*, 22 MARQ. SPORTS L. REV. 427, 442 (2012).

133. *Id.*

134. Letter from John E. Palomino, Regional Civil Rights Director, Office for Civil Rights, to Karen Gilyard, Esq., Atkinson, Andelson, Loya, Ruud & Romo (Feb. 7, 1995), available at <http://www2.ed.gov/about/offices/list/ocr/letters/jurupa.html>; see also OFFICE FOR CIVIL RIGHTS, TITLE IX INVESTIGATORS MANUAL 5 (1990).

135. Letter from John E. Palomino to Karen Gilyard, *supra* note 134; see also Daniels v. Sch. Bd. of Brevard Cnty., Fla., 985 F. Supp. 1458, 1462 (M.D. Fla. 1997) (“The Defendant suggests that it cannot be held responsible if the fund-raising activities

It is equally clear that a sport's ability (or potential) to generate revenue does not justify unequal treatment.<sup>136</sup> As one federal court has succinctly noted, "Title IX requires that revenues from all sources be used to provide equitable treatment and benefits to both girls and boys. A source of revenue may not justify the unequal treatment of female athletes."<sup>137</sup> Title IX's legislative history further helps clarify this point. In 1974, Senator John Tower proposed an amendment that would have exempted revenue-producing intercollegiate sports from Title IX's coverage.<sup>138</sup> Congress's rejection of this and subsequent similar amendments<sup>139</sup> sends a clear message that the law authorizes no special treatment based on revenue, a sentiment echoed by OCR as well.<sup>140</sup>

Case law also provides support for the idea that a sport's potential to generate revenue creates no exception to a college or university's obligation to provide equal treatment to its men's and women's athletics programs.<sup>141</sup> In one case, plaintiffs challenging unequal treatment of Temple University's women's athletics program as a violation of the Equal Protection Clause relied in part on the fact that Temple spent "\$2100 more per male student athlete than female student athlete."<sup>142</sup> The university attempted to neutralize this disparity by arguing that it was skewed by the inclusion of revenue-producing sports. But the court rejected the relevance of this consideration. For one reason, the court was not satisfied that Temple's women's sports would not also produce revenue if they received the same investment of resources. More fundamentally, however, the court understood that "it is clear that financial concerns alone cannot justify gender discrimination."<sup>143</sup> In another case, the Washington State Supreme

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of one booster club are more successful than those of another. The Court rejects this argument. It is the Defendant's responsibility to ensure equal athletic opportunities, in accordance with Title IX. This funding system is one to which Defendant has acquiesced; Defendant is responsible for the consequences of that approach.").

136. *Brake*, *supra* note 130, at 125–26 (noting that the sports that produce revenue "do so because educational institutions have chosen to invest substantial resources in them to make them popular").

137. *Ollier v. Sweetwater Union High Sch. Dist.*, 858 F. Supp. 2d 1093, 1112 (S.D. Cal. 2012).

138. 120 Cong. Rec. 15,322, 15,322–15,323 (1974).

139. For detailed legislative history on this issue, see Christina Johnson, Note, *The Evolution of Title IX: Prospects for Equality in Intercollegiate Athletics*, 11 GOLDEN GATE U. L. REV. 759, 764–66 (1981).

140. 1979 Policy Interpretation, *supra* note 119, at 71,419 ("[A]n institution of higher education must comply with the prohibition against sex discrimination imposed by that title and its implementing regulations in the administration of any revenue producing intercollegiate athletic activity.") (quoting April 18, 1979, Opinion of General Counsel, Department of Health Education and Welfare, page 1).

141. *Haffer v. Temple Univ.*, 678 F. Supp. 517 (E.D. Pa. 1987).

142. *Id.* at 527–28.

143. *Id.* at 530.

Court rejected the University of Washington's argument that "[b]ecause football is operated for profit under business principles, [it] should not be included in determining whether sex equity exists."<sup>144</sup> Though the court went on to affirm an injunction that allowed each sport to "reap the benefit of revenue it generates," it emphasized that this allowance did not change the university's overall obligation to "achieve sex equity under the Equal Rights Act."<sup>145</sup> To be sure, the courts in these two cases were applying federal and state equal protection mandates rather than Title IX. The relative lack of litigation on this point under Title IX only reflects that the statute's treatment of this issue is even more clearly settled.

### 3. Benefits Obtained Through Collective Bargaining Are Subject to Equal Treatment

Consistent with these fundamental principles of equality reflected in Title IX, including the idea that sexism in the marketplace does not absolve universities of discrimination based on sex, courts and regulators properly ought to continue to interpret the statute to prohibit college and university athletic departments from providing a higher-quality athletic experience to athletes of one sex—even if the favorable treatment that creates that disparity arises from a collective bargaining process.<sup>146</sup> Imagine, for example, that Northwestern decided to provide comprehensive health insurance to athletes on the football team. Now imagine that the university decides to limit this benefit only to athletes on the football team, on the grounds that football generates the most revenue, or on the grounds that football has an active booster club that has raised and donated money for this purpose. There is nothing in Title IX that prohibits the university from extending that benefit to those players for those reasons. But, applying the analysis above,<sup>147</sup> the law clearly requires the university to provide a commensurate number of female athletes with the equivalent benefit, even

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144. *Blair v. Wash. State Univ.*, 740 P.2d 1379, 1383 (Wash. 1987).

145. *Id.* at 1384.

146. Some may object on fairness grounds to a result in which female athletes would benefit from compensation they have not essentially earned by offering marketable labor or names, images, and likenesses. To address this discomfort, I first point out that the O'Bannon trust fund itself, before considering its application to female athletes, already allows free-riders, by requiring payments "in equal shares" to the athletes on a team—including those who did less or nothing to contribute to the overall demand for the right to broadcast the team's games. *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 983 (N.D. Cal. 2014). As for collective bargaining, that too—generally speaking, has been known to benefit free-riders such as public sector employees who exercise their rights under right-to-work laws to opt out of union membership. *See, e.g., Harris v. Quinn*, 134 S. Ct. 2618 (2014) (enjoining the enforcement of a provision of state law that would have required home health care workers to pay dues to a public sector union as a means of deterring free riders).

147. *See supra* Part II.B.2.

though the reasons for extending it to the football players do not apply to them. Now change the university's reason for providing its football players with comprehensive health insurance to one rooted in collective bargaining. The Title IX outcome does not change; there is nothing in the statute that prohibits the university from extending that benefit to those players for that reason. But it must still comply with equal treatment by extending that benefit to a proportionate number of women.

Comprehensive health insurance is arguably the most straightforward example to illustrate the role that Title IX, properly construed, should have on benefits that are obtained by athletes through collective bargaining. This is because the "laundry list" of factors the Title IX regulations provide as the basis for measuring equal treatment of men's and women's athletics programs expressly includes "provision of medical services"<sup>148</sup>—a factor that has been interpreted to include "health, accident, and injury insurance coverage."<sup>149</sup> Other items that could potentially be on the bargaining table include multi-year scholarships, stipends, trust fund payments, or other manners of financial compensation, things that are not expressly mentioned in the equal treatment regulation. Yet, it is still proper to conclude that Title IX would require a college or university to offer these benefits to female athletes as well. For one reason, the regulations make clear that the laundry list is not exhaustive; it is preceded with language stating that equal treatment is measured by consideration of these "*among other factors*"<sup>150</sup> and OCR has elsewhere considered non-laundry list items such as recruiting and administrative support to be components of equal treatment.<sup>151</sup>

For another reason, the concept of equal treatment in the aggregate also underscores the regulation pertaining to athletic financial aid.<sup>152</sup> This regulation would apply to any bargained-for compensation that is tied to educational expenses, such as increased scholarship amounts or cost-of-attendance stipends. Because the regulation requires an allocation of dollars that is proportionate to the percentage of athletes of each sex,<sup>153</sup> a college or university would have to provide a proportionate match for

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148. 34 C.F.R. § 106.41(c)(8) (2010).

149. 1979 Policy Interpretation, *supra* note 119, at 71,417.

150. 34 C.F.R. § 106.41(c) (2010); 1979 Policy Interpretation, *supra* note 119, at 71,415.

151. 1979 Policy Interpretation, *supra* note 119, at 71,417.

152. 34 C.F.R. § 106.37(c) (2004).

153. 1979 Policy Interpretation, *supra* note 119, at 71,415 ("The Department will examine compliance with this provision of the regulation primarily by means of a financial comparison to determine whether proportionately equal amounts of financial assistance (scholarship aid) are available to men's and women's athletic programs. The Department will measure compliance with this standard by dividing the amounts of aid available for the members of each sex by the numbers of male or female participants in the athletic program and comparing the results.").

women any increase in dollars that it allocates to male athletes.<sup>154</sup> Other ways in which athletes may bargain to be compensated could be construed to fall outside the scope of the financial aid regulation, which by its terms addresses grants and other non-grant assistance such as loan assistance or work-study that is aimed at defraying educational costs. However, such compensatory payments would properly be governed by the more general principle of equal treatment codified elsewhere in the regulations. Whether a college or university was induced by collective bargaining to provide seasonal stipends to union athletes, or even to buy them all cars, those benefits become characteristics of the athlete experience no different in kind from access to academic tutoring, special housing or meal privileges, laundry service, or any other perk that universities already provide their athletes and which already must be available to male and female athletes on equal terms.

#### 4. College Athletes with “Employee” Status Are Not Outside the Scope of Title IX’s Regulations Pertaining to Athletics

One final issue to consider in determining the Title IX implications for benefits obtained through collective bargaining is the extent to which Title IX applies to college athletes who have been deemed “employees” under the NLRA. Given that part of the NLRB’s reasoning in reaching that conclusion was distinguishing the college football players in Northwestern from students to whom the label employee did not apply, it may be tempting to assume that being considered an employee for labor law purposes forecloses treating that individual as a student for other purposes.

Yet the fact that unionized athletes are considered employees for labor law purposes does not foreclose applying Title IX’s regulations that apply to athletic opportunities and athletic financial aid. Regulators apply a functional test to determining the opportunities to which Title IX’s athletics regulations apply. Specifically, the test considers whether the participant is “receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport’s season” and who practices or competes with the team and is listed on the roster as an eligible member of the squad.<sup>155</sup> As long as these factors

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154. Multi-year scholarships raise a different consideration as the decision to award multi-year scholarships does not itself change the total scholarship dollars that a college or university is making available to its athletes of either sex. However, the fact of having a multi-year scholarship (and with it, the security of automatic renewal) is properly considered a component of equal treatment that, separate from consideration of the dollar amounts, should benefit female athletic opportunities proportionally.

155. 1979 Policy Interpretation, *supra* note 119, at 71,415. Alternatively, if injury prevents an athlete from meeting these requirements but that individual nevertheless

continue to describe those students who may also, by virtue of the NLRB's determination, be considered employees under the NLRA, there is no justification for excluding their athletic opportunities from a Title IX analysis. And while it may seem unusual that Title IX and the NLRA would simultaneously apply to the same enterprise given the respective statutes' distinct and different scope and purpose, considering the hybrid nature of big time college athletic programs helps to clarify that this is indeed the correct result. The educational aspect of college athletic programs—the fact that they are run by educational institutions and purport to have an educational purpose and mission (not to mention the benefit of education's tax-exempt status)—justifies application of Title IX and its regulations that subordinate the institution's business objectives to higher priorities like equality and nondiscrimination. The commercial aspect of college athletic programs—the fact that they are utilizing the labor of others in pursuit profits—justifies applying labor law principles that apply to any other private business.

This “both/and” mentality (i.e., that college athletes may be both employees for purposes of labor law and still partake in athletic opportunities under Title IX) means that it is not enough to apply traditional employment discrimination principles regarding equal pay to the compensation college athletes may obtain through collective bargaining—as tempting as that may be for colleges and universities who would rather not provide compensation to female athletes in nonrevenue sports. Some have argued that courts and regulators are sometimes permissive of revenue-based justifications for higher compensation for coaches of men's teams than women's, and argued that this standard would justify excluding female athletes from a compensation that male athletes obtained through collective bargaining. One commentator in particular<sup>156</sup> pointed to *Stanley v. University of Southern California*,<sup>157</sup> in which the Ninth Circuit Court of Appeals concluded that a female women's basketball coach who was paid less than the male men's-team counterpart failed to make a prima facie case of pay discrimination because the men's team's capacity for revenue made the jobs sufficiently dissimilar to warrant comparable pay. Yet, this case should not be read to support the conclusion that male players' capacity justifies paying them to the exclusion of female counterparts. For one reason, the proper reading of *Stanley* is a narrow one. The EEOC has issued guidance that suggests revenue-generation does not justify compensation disparities between male and female coaches unless “the woman is[] given

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receives athletic financial aid, the athlete's opportunity will count for Title IX purposes as well. *Id.*

156. Edelman, *supra* note 5. Edelman, *supra* note 43, at 1051.

157. 178 F.3d 1069 (9th Cir. 1999).

the equivalent support to enable her to raise revenue”<sup>158</sup> a condition that likely only applies to few women’s teams. More importantly, however, *Stanley* is a case about coaches, whose terms and conditions of employment are outside the scope of Title IX’s equal treatment regulations governing the athletic opportunities available to students.<sup>159</sup> Since coaches’ rights are provided for elsewhere in Title IX and not under the “separate but equal” framework that applies to athletic programs, it is not proper to analogize coaches’ compensation to that of athletes.

### C. Title IX’s Application to the *O’Bannon* Remedies

Having examined the Title IX implications for benefits obtained through collective bargaining, the outcome at stake in Northwestern, this Part will now turn to the *O’Bannon* remedies to address what particular Title IX related considerations would apply. If the district court decision survives appeal, the NCAA will have to loosen its restrictions on athletes’ partaking in revenue generated by the use of their names, images, and likenesses by allowing its members to use licensing revenue to increase athletic financial aid to cover the true cost of attendance and to fund a trust from which to make payments to athletics upon graduation.<sup>160</sup> Because the *O’Bannon* plaintiffs included Division I FBS football players and Division I men’s basketball players,<sup>161</sup> the validity of NCAA restrictions on compensation of other athletes, including female athletes, is outside the scope of her opinion and apparently not addressed by the injunction issued in the case. Title IX, however, would apply to any payments made to athletes under *O’Bannon*, for the same reasons that the statute applies to compensation obtained through collective bargaining. As explained above, if colleges and universities are paying to enhance the athlete experience in some way, the source of funding for that enhancement does not matter. It is already the case that colleges and universities use licensing revenue from men’s

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158. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE ON SEX DISCRIMINATION IN THE COMPENSATION OF SPORTS COACHES IN EDUCATIONAL INSTITUTIONS, EEOC Notice No. 915.002 (1997), available at <http://eeoc.gov/policy/docs/coaches.html>.

159. To be clear, Title IX regulations do include access to coaching and quality of coaching as factors on the laundry list. But OCR and courts are clear that aspect of Title IX protects students’ rights to receive equal treatment in this regard and does not protect coaches against discrimination. Title IX (along with Title VII and the Equal Pay Act) does protect coaches against sex discrimination, but the unique separate-but-equal framework that Title IX uses for athletic opportunities does not apply to employment (see discussion above).

160. See *supra* Part I.C.2.

161. Order Granting in Part and Denying in Part Motion for Class Certification, In re NCAA Student-Athlete Name & Likeness Licensing Litig., No. C 09–1967 CW, 2013 WL 5979327, at \*3 (N.D. Cal. Nov. 8, 2013).



basketball and football to fund various aspects of their athletic programs.<sup>162</sup> Just as Title IX does not permit them now to use the fact that men's sports generates more of that revenue as a justification for more favorable treatment for those programs relative to women's programs, they may not use that argument in the future to limit trust payments or cost-of-attendance stipends only to members of one sex.<sup>163</sup>

Relatedly, as explained above, the fact that courts' and regulators' interpretations of the Equal Pay Act consider revenue generation as a factor "other than sex" that can (in limited circumstances) justify pay disparities among coaches does not supersede Title IX's requirement that institutions provide equal treatment in the aggregate to athletes in men's and women's programs.<sup>164</sup> Yet even if it was appropriate to construe revenue generation as a sex-neutral factor, revenue-generation is not the criteria institutions will use to determine who is eligible for payments from an *O'Bannon* trust. Under the terms of the court's injunction, the NCAA may not prohibit institutions from offering trust fund payments "in equal shares" to all members of the team.<sup>165</sup> An institution cannot withhold or reduce payment from those members of the team who contributed less or not at all to the team's marketability. Eligibility for trust payments is not determined by revenue generation; it is determined by participation on a team.<sup>166</sup> As such, trust fund payments should be equalized by sex just as other benefits that are bestowed by virtue of participation on a team are equalized under Title IX.

Additionally, the fact that a trust mechanism could be used to essentially hold athletes' payments in escrow until graduation arguably should not change the Title IX analysis either. While they may be former athletes when they receive the payment, they are eligible for it by virtue of having participated in college athletics. The vested interest in future payment<sup>167</sup>

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162. NCAA REVENUES/EXPENSES DIVISION I REPORT, *supra* note 39, at 30. Division I FBS institutions generate a median of \$10.4 million in revenue from distributions from their conferences and the NCAA. These distributions are, in turn, funded with revenue from contracts with broadcasters. See Chris Smith, *The Most Valuable Conferences in College Sports 2014*, FORBES (Apr. 15, 2014), <http://www.forbes.com/sites/chris-smith/2014/04/15/the-most-valuable-conferences-in-college-sports-2014/>; see also *Revenue*, NCAA, <http://www.ncaa.org/about/resources/finances/revenue> (last visited Mar. 13, 2015).

163. See *supra* Part II.B.2. See also Jason Chung, *The NCAA and the Student-Athlete Trust Fund: Is Compromise Possible?* (Apr. 26, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2318909](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2318909) (concluding that Title IX applies to O'Bannon trust fund payments).

164. See *supra* Part II.B.4.

165. *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 983 (N.D. Cal. 2014).

166. *Id.*

167. See Michael McCann, *What Ed O'Bannon's Antitrust Victory over the NCAA Means Going Forward*, SPORTS ILLUSTRATED (Aug. 9, 2014),

becomes an aspect of participation in college athletics, which as such must be equalized between the programs for each sex.<sup>168</sup> Nor can institutions avoid their Title IX compliance obligations by allowing trusts to be administered at the conference level, rather than creating their own. While it is arguable that a conference may not itself have an obligation to comply with Title IX,<sup>169</sup> a conference-administered trust would be funded with payments or diverted revenue from the college or university and earmarked specifically for application to the trust.<sup>170</sup> Payments from the trust are thus the equivalent of institutional payments, to which Title IX would apply.<sup>171</sup>

In light of the conclusion that Title IX applies to *O'Bannon* remedies, the NCAA would have to amend its bylaws to permit institutions to offer some manner of commensurate compensation to female athletes; otherwise, NCAA members would face a dilemma of compliance with NCAA bylaws or Title IX.<sup>172</sup> While it is clear that such a bylaw change would have to permit member institutions to comply with Title IX, there is arguable flexibility in the form such compliance could take. One justifiable approach would be to permit member institutions to match the aggregate increased spending attributable to *O'Bannon* with a dollar amount to compensate female athletes that is proportionate to the percentage of the institution's athletes who are female. This proportionality approach finds its support in the Title IX regulations governing athletic scholarships and grants-in-aid,<sup>173</sup> arguably the closest analogs to stipends and trust fund payments that are expressly mentioned in the Title IX regulations. The regulations require that institutions distribute athletic scholarship dollars in aggregate proportion to the percentage of athletes of each sex.<sup>174</sup> To illustrate how this measure of equality would apply to the *O'Bannon*

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<http://www.si.com/college-basketball/2014/08/09/ed-obannon-ncaa-claudia-wilken-appeal-name-image-likeness-rights> (recognizing the possibility of Title IX's application to trust fund payments by analogizing them to deferred compensation).

168. See *supra* Part II.B.3.

169. Cf. *NCAA v. Smith*, 525 U.S. 459 (1999) (holding that the NCAA does not have an obligation to comply with Title IX simply by virtue of receiving dues from federally-funded institutions).

170. See *id.* at 468 (distinguishing the payment of dues from payments that are earmarked for a particular purpose).

171. See *supra* Part II.B.3.

172. *O'Bannon* operates to enjoin the NCAA from enforcing its bylaws to the extent they prohibit cost-of-attendance stipends and trust fund payments to male basketball and football players. So it is not necessary for the NCAA to revise its bylaws to allow members to make such payments. However, the injunction does not prohibit the NCAA from enforcing its bylaws to the extent they prohibit payments to any other athletes. The NCAA would therefore have to relax its restrictions on athlete compensation as they pertain to female athletes, in order to let institutions satisfy their obligations under Title IX.

173. 34 C.F.R. § 106.37(c) (2004).

174. *Id.*

remedies, imagine an institution where 52% of the athletes are male and 48% are female. Then imagine that, pursuant to *O'Bannon*, the institution makes 150 \$10,000 payments<sup>175</sup>—a total of \$1,500,000—in a given year to football and men's basketball players. Borrowing the scholarship regulations' proportionality approach, the institution would be obligated to make an additional \$1,384,615 available to female players, since that is the dollar amount relative to \$1,500,000 that is proportionate to 48%. The per-player distribution of that amount would be up to the institution, subject to whatever limits the NCAA retains on the dollar value per scholarship and the number of scholarships per team. Alternatively, the NCAA would arguably be justified from a Title IX standpoint if it permitted colleges and universities to match stipends and trust fund payments "one-for-one." This approach finds support in the regulation's requirement that institutions provide equal treatment to men's and women's programs in the aggregate.<sup>176</sup> Trust fund payments and cost of living stipends are just another way in which football and men's basketball are "tiered."<sup>177</sup> Viewed this way, the same benefits should be made available to some combination of women's teams whose combined roster totals would be comparable to the combined number of men's basketball and football players.

### III. TITLE IX IMPLICATIONS FOR COLLEGE ATHLETIC REFORM

*Northwestern* and *O'Bannon* raise the cost of running athletic departments that are educational and commercial in nature. Not only by mandating the compensation of athletes whose labor is valuable, but because of the simultaneous application of Title IX, the compensation of other athletes as well. The NCAA worries that the cost of compensating athletes will destroy college sports.<sup>178</sup> To the extent that this is true, it is even more so when we factor in the added cost of Title IX compliance.<sup>179</sup> The result is that it may be too costly for college athletic departments to

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175. One-hundred and fifty is the institution's combined football and men's basketball roster, and \$10,000 reflects the total of a \$5,000 payment to the trust plus a \$5000 stipend to reflect the trust cost of attendance that is not already covered by grant-in-aid. See, e.g., Michael A. Lindenberger, *Texas Athletic Director: With New Rules, Longhorns Would Pay Each Player \$10,000*, DALLAS MORNING NEWS, Oct. 21, 2014, <http://www.dallasnews.com/sports/college-sports/headlines/20141021-texas-athletic-director-with-new-rules-longhorns-will-pay-each-player-10000.ece>.

176. See *supra* Part II.B.1.

177. See 1979 Policy Interpretation, *supra* note 119, at 71,422.

178. See, e.g., Edelman, *supra* note 43, at 1054 (noting and criticizing the NCAA's argument that athlete compensation would "destroy college sports").

179. See SACK & STAUROWSKY, *supra* note 14, at 145 (suggesting that Title IX responsibilities associated with commercial model could push schools in the direction of educational reform).

operate as they presently do. This reality, however, should not be an argument that compliance obligations should not apply. Rather, it should be harnessed as leverage for meaningful reform of college athletics.

To this end, I argue in this Part that the costly compliance burdens college and university athletic departments are facing result as much from the choices they have made about the nature of the programs they run as they do from the external application of law. In particular, college athletics has cultivated for itself a hybrid status that seeks to capitalize on the benefits of being both educational and commercial in nature.<sup>180</sup> *Northwestern* and *O'Bannon* force college athletics to internalize more of the cost of its commercial endeavors by ensuring that it, like any other business, adheres to the rules of the marketplace. If college athletics does not wish to add those compliance obligations onto its existing regulatory burden, which includes Title IX, it has the choice to reform itself into a purely educational model, one to which the reasoning of *Northwestern* and *O'Bannon* would no longer apply. Alternatively, college athletics could choose to accept the cost of pursuing commercial interests and reduce its compliance burden by abandoning its relationship with higher education. Both of these options for reform are discussed more fully in this Part.

#### A. Purely Educational Athletics Programs

College athletics' affiliation with higher education comes with both benefits and costs. Benefits include exemption from tax on generated income,<sup>181</sup> ability to issue bonds and take on low-interest debt for capital projects,<sup>182</sup> institutional subsidies,<sup>183</sup> and goodwill of the public, students, and alumni. Costs, in turn, include compliance with laws like Title IX, which constrain college athletic department from making the kind of free-market choices that businesses would otherwise make. Title IX, like other civil rights laws, represents a democratic consensus that constraints on capitalism are justified by a higher priority on equality in such fundamental

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180. See ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS 6 (Princeton University Press 1999) (arguing that big-time college athletic departments have it both ways by aligning with education for tax purposes and using business rationale but objecting to Title IX on business grounds).

181. Amy Christian McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 502 (2008) (also pointing out that colleges and universities are not required to pay Unrelated Business Income Tax on revenue generated by their athletic departments).

182. STEPHEN E. WEYL & RONALD F. RODGERS, TAX-EXEMPT BONDS: CONSIDERATIONS FOR COLLEGE AND UNIVERSITY IN-HOUSE COUNSEL 1-2 (2006), available at <http://www.higheredcompliance.org/resources/resources/TaxExemptBonds.pdf>.

183. NCAA REVENUES/EXPENSES DIVISION I REPORT, *supra* note 39, at 30, tbl. 3.7.

contexts as education.<sup>184</sup> Accordingly, Title IX prevents college athletic departments from using commercial objectives as the sole basis for allocating resources, and instead requires equal treatment to women's sports even though they have less potential to generate revenue.<sup>185</sup>

For a college athletic department that wishes to retain its association with higher education, compliance with Title IX is mandatory. Compliance with labor and antitrust law, on the other hand, is not. A project of reform that distances college athletics from commercial objectives and practices would necessarily render inapplicable both *Northwestern's* requirement that athletic departments collectively bargain with athletes and *O'Bannon's* antitrust scrutiny over the NCAA's amateurism rules. One essential aspect of such reform is the revival of the Sanity Code's ban on athletic scholarships,<sup>186</sup> in favor of a system like that of the Ivy League and Division III, in which financial aid is awarded based on need rather than athletic participation.<sup>187</sup> This change would undermine the Regional Director's rationale in *Northwestern* for concluding that some athletes qualify as employees based on the presence of compensation and control.<sup>188</sup> As discussed earlier, the Director found that the athletic scholarship was tantamount to compensation, while the fact that it was conditioned on the athletes' continued participation suggested control.<sup>189</sup> But if college athletic departments replaced athletic scholarships with need-based support, they would no longer be engaging compensation or control, because an athlete could discontinue participation on the team and still be eligible for financial aid. Such reform would also signal that the institution's priority is the student's education rather than his participation in athletics. In this way, it addresses concern that college athletes are exploited, since it would restore an athlete's choice to participate in athletics without concern for economic consequences.<sup>190</sup>

A second aspect of education-based reform is to drastically reduce the

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184. E.g., Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1213 (2014) (acknowledging the conflict between civil rights and private choice); Andrew Altman, *Civil Rights*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* § 3.2 (Edward N. Zalta et al. eds., Summer 2013), available at <http://plato.stanford.edu/archives/sum2013/entries/civil-rights/>.

185. See *supra* Part II.B.2.

186. See *supra* Part I.B.

187. See GRANT, *supra* note 12, at 456; see also JOHN GERDY, *AIR BALL, AMERICAN EDUCATION'S FAILED EXPERIMENT WITH ELITE ATHLETICS* (2006); Brian L. Porto, *Completing the Revolution: Title IX As Catalyst for an Alternative Model of College Sports*, 8 SETON HALL J. SPORT L. 351, 403–04 (1998)

188. See *supra* Part I.C.1.

189. *Id.*

190. See Buzuvis, *supra* note 49, at 119 (“To eliminate exploitation and promote right-sized college athletics programs, it is also necessary to eliminate athletic scholarships.”).

time commitment required for participation in college athletics. In addition to neutralizing the Director's arguments about the presence of employer-like control,<sup>191</sup> such reform would satisfy concerns about athlete exploitation by ensuring that participation in athletics does not obstruct pursuit of meaningful education. Time commitment restraints would provide athletes with the freedom to select majors and courses with less concern for conflicts with practice schedules and travel obligations.

Reform that restores the priority of academics in this manner would also have the effect of subordinating a college athletic department's commercial objectives. Right-sized expectations about revenue will reduce the pressure to engage in the very spending arms race that made the NCAA's restraints on player compensation harder to defend in *O'Bannon*.<sup>192</sup> Moreover, replacing athletic scholarships with need-based financial aid and reducing the maximum time commitment for athletics would operate "to integrate student-athletes into academic communities of their schools,"<sup>193</sup> and would thus help the NCAA defend its amateurism rules. As various antitrust cases against the NCAA have made clear, the NCAA is more vulnerable to antitrust liability when it coordinates members' commercial operations than when it is engaging in non-commercial functions.<sup>194</sup> For this reason as

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191. See *supra* Part I.C.1.

192. *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 1002 (N.D. Cal. 2014) (rejecting the NCAA's argument that restraining athlete compensation is necessary to promote competitive balance among teams, in part because it is already the case that colleges and universities spend exorbitantly on athletic programs). Moreover, the court relied on the increased commercialization of college athletics to distinguish the facts in *O'Bannon* from the facts that gave rise to an earlier court's finding that competitive balance could justify amateurism restrictions. *Id.* (citing *NCAA v. Bd. of Regents of the Univ. of Okla.*, 546 F. Supp. 1276, 1296, 1309–10 (W.D. Okla. 1982)).

193. *Id.* at 1004. See also *id.* at 1003 (noting that the goal of athlete integration is promoted by, among other things, access to financial aid and restrictions on requiring athletes to practice more than a certain number of hours each week).

194. See *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984). In *Board of Regents*, the Court invalidated the NCAA's plan to regulate its member institutions' television broadcasts as an unreasonable restraint on trade. Yet, the Court emphasized the narrowness of its decision by including language that suggested other aspects of the NCAA roles not affected by its decision, including the association's "critical role in . . . maintain[ing] [the] revered tradition of amateurism in college sports." *Id.* at 120. Relying on this distinction in *Board of Regents*, some lower courts have rejected antitrust challenges to those efforts of the NCAA, like setting rules of eligibility, that are "not related to the NCAA's commercial or business activities." *Smith v. NCAA*, 139 F.3d 180, 185 (3d Cir. 1998), *rev'd on other grounds*, 525 U.S. 459 (1999); see also *Pocono Invitational Sports Camp v. NCAA*, 317 F. Supp. 2d 569, 584 (E.D. Pa. 2004). This distinction suggests that the less commercial college athletics, the less vulnerable the NCAA is to antitrust liability. Moreover, even in those courts that have refused to carve out special treatment for the NCAA's non-commercial activities have done so on grounds of today's reality that "big time" college programs are infused with commercial values. See *Agnew v. NCAA*, 683 F.3d 328, 340 (7th Cir. 2012) ("No knowledgeable observer could earnestly assert that big-time college

well, education-based reform would operate not only to insulate NCAA members from an obligation to engage in collective bargaining with athletes, but from antitrust liability as well.

An education-based reform would eliminate arguments that athletes are exploited, foreclose an institution's obligation to engage in collective bargaining, and reduce antitrust scrutiny on the NCAA's amateurism rules. In addition, such reform would have the benefit of improving Title IX compliance. Without the pressure to generate revenue, athletic departments would have more freedom to distribute resources across a wider array of programs, including both women's sports and non-revenue men's sports.<sup>195</sup> While an education model of college sports would likely force some programs to sacrifice revenue, this is not necessarily a threat to women's sports because many revenue-generating programs do not turn a profit that can be used to support other programs.<sup>196</sup> Moreover, it is also the case that programs in an educational model should be less expensive to run. In addition to no longer having to pay athletic scholarships, restrictions on athletes' time commitment would drive institutions to replace expensive, long-distance competition with a less expensive, regional schedule of competition. Athletic opportunities that are compatible with education are also arguably more deserving of institutional subsidies. If reform efforts transform college athletics into providing genuine extracurricular activities, imparting educational values in a manner consistent with the institution's

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football programs competing for highly sought-after high school football players do not anticipate economic gain from a successful recruiting program.”); *O'Bannon*, 7 F. Supp. 3d at 999–1000 (relying on plaintiff's “ample evidence” showing “that the college sports industry has changed substantially in the thirty years since Board of Regents was decided” in rejecting that the Court's favorable language about the NCAA's amateurism policy should apply today); see also Gabe Feldman, *A Modest Proposal for Taming the Antitrust Beast*, 41 PEPP. L. REV. 249, 254–55 (2014) (arguing that the amateurism “myth” that courts have relied on in upholding the NCAA's eligibility rules in antitrust cases “ignores the fact that the NCAA has become a profit-seeking enterprise that governs multi-billion dollar entertainment products.”). Such rationale further suggests that if the commercialism of college athletics was minimized through reform, the NCAA would have an easier time justifying its actions under antitrust law.

195. SACK & STAUROWSKY, *supra* note 14, at 130 (noting that Title IX compliance costs money that universities can't afford to spend if they are busy sinking costs into pursuit of the commercialized model of college sport); Buzuvis, *supra* note 49, at 111 (“Commercialism in college athletics threatens women's sports with permanent second-tier status because it authorizes universities to invest in teams in a manner proportionate to their attractiveness to spectators and fans—a measure that is stacked against women's sports—instead of in a manner designed to maximize the educational value of sports to student-athletes themselves, the ostensible mission of college athletics.”); Porto, *supra* note 187, at 405.

196. 54 out of 123 Division I football programs in the Football Bowl Subdivision do not generate net revenue. NCAA REVENUES & EXPENSES DIVISION I REPORT, *supra* note 39, at 27, tbl. 3.6.

overall mission, it should not need to rely on external revenue to justify its value to the college or university. For these reasons, the reform contemplated in this section is one that should unite reformers concerned about athlete exploitation, advocates for women's sports and non-revenue men's sports, as well as athletic departments that oppose *Northwestern* and *O'Bannon* out of concern for the high cost of compliance.

### B. Purely Commercial Athletics Programs

In contrast to a strategy of education-based reform, college athletic departments can alternatively reduce their compliance burdens by jettisoning their affiliation with higher education.<sup>197</sup> In this model of reform, colleges and universities would spin off their commercialized athletic departments into separate corporate entities that lack formal affiliation with the school. These new commercial entities—let's call them College Athletics Inc.—would forego existing institutional and governmental support for higher education and embrace the obligations of labor and antitrust law (as well as other laws that govern commercial enterprises like workers compensation, fair labor standards, and business income tax).<sup>198</sup> But in turn, College Athletics Inc. would no longer be

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197. CHARLES CLOTFELTER, *BIG-TIME SPORTS IN AMERICAN UNIVERSITIES* 215 (2011) (attributing this idea originally to former University of Michigan president James Duderstadt); GRANT, *supra* note 12, at 456; SACK & STAUROWKSY, *supra* note 14, at 142; *see also* Frank Deford, *Let's Separate the Schoolin' from the Sports*, NPR (June 26, 2013), <http://www.npr.org/2013/06/26/195501710/lets-separate-the-schoolin-from-the-sports> ("We in the U.S. think, nostalgically, of athletics as integral to higher education, but perhaps they're so unusual that they should be entirely separated from the academic and simply turned into an honest commercial adjunct."); Peter Morici, *Stop the NCAA insanity: Separate University Athletics from Academic Requirements*, FOX NEWS (Mar. 31, 2014), <http://www.foxnews.com/opinion/2014/03/31/stop-ncaa-insanity-separate-university-athletics-from-academic-requirements/> ("The solution may be to permit the top 30 or 40 major universities to form football and basketball teams 'affiliated' with their institutions and a major pro-franchise, but require those be self-financing based on ticket sales, TV revenues and contributions from their professional team.").

198. Because of the commensurate cost, such an approach would only be attractive to institutions in the top-earning conferences of Division I's FBS. GRANT, *supra* note 12, at 458. The recent reorganization of the NCAA's "Power Five"—the Big 10, the Big 12, the Pacific-12, the Southeastern Conference, and the Atlantic Coast Conference—could potentially provide limit to the scope of such a proposal. Because the Power Five conferences, with 65 members among them, generate the most revenue from broadcasts and ticket sales, they have both the incentive and the means to attract talented athletes by offering market-based compensation. Perhaps they are already taking a step in this direction, as the Power Five are reportedly already planning to consider proposals that would allow members to offer athletes stipends up to the cost of attendance. Dan Wolken, *NCAA Board Approves Division I Autonomy Proposal*, USA TODAY (Aug. 7, 2014), <http://www.usatoday.com/story/sports/college/2014/08/07/ncaa-board-of-directors-autonomy-vote-power-five-conferences/13716349/>.



subject to Title IX's requirement to support women's sports, since the law's scope only extends to programs run by federally funded educational institutions.<sup>199</sup> By divorcing college athletes from higher education, the commercialized athletic enterprises would be free to devote resources in any manner they wish in the pursuit of maximizing profits, including compensating employees on whatever terms the market would bear.

Of course, these employees would no longer be students<sup>200</sup> but professional athletes in the paradigm of a minor league.<sup>201</sup> Those that do not continue their careers into the NFL or the NBA could elect to pursue college education once their engagement with College Athletics Inc. is over.<sup>202</sup> They could even potentially bargain for future tuition payments as a form of deferred compensation.<sup>203</sup> In this way, a move to purely commercial college athletic programs would eliminate concerns about athlete exploitation. College athletics could no longer pretend that

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199. 20 U.S.C. §§ 1681, 1687 (2014). In order for an enterprise like College Athletics, Inc. to fall outside of Title IX, it would have to be legally as well as functionally separate from its former university. If the university continues to provide funding and exert control over the incorporated athletic department, the athletic department would still appear to be an "operation" of a "college [or] university . . . any part of which is extended federal funding assistance" and thus subject to Title IX. *Id.* at § 1687; *Williams v. Bd. of Regents of the Univ. of Ga.*, 477 F.3d 1282, 1294 (11th Cir. 1997).

If outside the scope of Title IX, College Athletics, Inc. would not have to provide commensurate resources to women's athletics program, since that "separate but equal" model of equality is unique to Title IX and justified when athletic opportunities are being provided in an educational setting. As an employer, College Athletic, Inc. would be prohibited by Title VII from discriminating on the basis of sex in its hiring decisions and in the terms and conditions of employment. As this applies to the hiring of athletes, however, Title VII would only require the employer to avoid using sex as a reason not to hire an otherwise qualified female athlete for the position. It would not require the enterprise to offer separate programs for women or hire female athletes who do not meet the physical requirements of the position. *See, e.g., Lanning v. Southeastern Pa. Transit Auth.*, 308 F.3d 286 (3d Cir. 2002) (upholding employer's requirement for physical fitness that had a disparate impact on female applicants); *see also* Syda Kosofsky, *Toward Gender Equality in Professional Sports*, Note, 4 HASTINGS WOMEN'S L.J. 209, 236 (1993) ("Since professional sports are a form of paid employment, theoretically, the Civil Rights Act and the Equal Pay Act should be useful in rectifying the discrimination that professional women athletes experience in the form of denial of opportunity and unequal pay . . . . However, both the Acts themselves and their judicial interpretation are inherently limited by the underlying theories of gender differences.").

200. If athletes receive "institutionally-sponsored support normally provided to athletes competing at the institution," then Title IX would apply. *See supra* Part II.B.4 (citing 1979 Policy Interpretation, *supra* note 119, at 71,415).

201. GRANT, *supra* note 12, at 456.

202. *Cf. Morici, supra* note 197 ("Pay the athletes, offer them the opportunity to earn a degree over five or even six years, but don't require them to enroll if they are not capable or are simply disinclined.").

203. SACK & STAUROWKSY, *supra* note 14, at 142.

“student-athletes” are students and use the semblance of an education as an excuse not to pay them. Athletes could make clear choices about whether to pursue playing career or an education, or even to fully engage in the former and then the latter.

While such an approach would not increase women’s athletic opportunities within College Athletics, Inc., this version of athletics reform would have the benefit of sequestering the problem of gender inequality outside the realm of education where it is particularly powerful and offensive.<sup>204</sup> Meanwhile, the institution itself could continue to provide a more diverse array of lower-cost athletic opportunities for men and women consistent with the educational model discussed above. In fact, the institution could generate revenue necessary to fund those opportunities by leasing its facilities and licensing its trademark name and mascots, etc. to the incorporated athletic department.<sup>205</sup> In this way, the reform described in this section could potentially produce a net increase in the number of college athletic opportunities as well as gender equality among those that remain under the auspices of higher education.

Though limited in attractiveness to only the most profitable programs, within that group this proposal could potentially appeal to reformers opposed to athlete exploitation, advocates for women’s sports and men’s nonrevenue sports, as well as those concerned about the cost of compliance.

#### CONCLUSION

As a result of recent litigation, college athletics may soon be compelled by law to reform its long-standing policy of amateurism that prohibits compensation to athletes. This result, which flows from the application of labor and antitrust law to increasingly commercialized college athletics, will raise the cost of running college athletic departments, not only to provide the compensation to the athletes in commercialized programs, but, by virtue of Title IX, to female athletes in non-revenue sports as well. Yet rather than downplaying the role of Title IX in this regard, reformers should embrace its potential to help ensure that the commercial/educational hybrid model of college athletics is one that is too costly to sustain. By converting from hybrids into purer versions of either education or commercial, college athletics can minimize concerns about exploitation, promote gender equity, restore educational compatibility, and contain costs. For these reasons, it is important that college athletics confront the Title IX implications of decisions that result in compensation for athletes.

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204. See, e.g., Brake, *supra* note 131, at 82 (“Educational institutions play a key role in the social processes that construct the cultural meaning of sport and its relationship to masculinity and femininity.”).

205. GRANT, *supra* note 12, at 456; CLOTFELTER, *supra* note 197, at 215.



# RESOLUTION MECHANISMS TO COMBAT FINANCIAL PRESSURES WITHIN COLLEGES AND UNIVERSITIES

CARA SWINDLEHURST

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Economic downturns have hit nearly every market in the United States since the 2007 to 2009 Great Recession. Colleges and universities are no different. State funding decreases, technological advancements and increased online course offerings, and lowered revenue from endowment investments are among the various reasons that colleges and universities are having to make tough budgetary decisions.<sup>1</sup> While the financial struggles are often unavoidable, the paths out of financial instability are numerous, and college and university administrators must use rational decision making to choose the right avenue of resolution.

Historically, as colleges and universities faced financial pressures, they filed for financial exigency in order to default on financial obligations and eliminate tenured positions that were no longer sustainable. Financial

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1. Kevin Kiley, *Flat-Out Disappointment*, INSIDE HIGHER ED (Feb. 1, 2013), <http://www.insidehighered.com/news/2013/02/01/endowments-averaged-small-loss-2012-fiscal-year>.

exigency has long been recognized as a financial state of urgency that makes the firing of tenured faculty permissible.<sup>2</sup> While financial exigency is a legitimate solution to financial pressures within colleges and universities, more and more colleges and universities are now choosing different paths towards solvency. Worries of negative reviews from bonding agencies and accreditors, and negative responses from students and donors are among the reasons that administrators avoid declaring financial exigency.<sup>3</sup>

In addition to the changes that colleges and universities are implementing in handling their financial difficulties, there are also new hurdles that colleges and universities face to remaining in good financial standing. Due to state budgetary concerns causing drops in funding, and in addition to endowment revenue concerns, colleges and universities must worry about how the technological age is going to affect their enrollment, and as a result, their solvency. As colleges and universities take on these new problems, and continue to face pre-existing financial pressures, they must find a way to cut costs while avoiding a declaration of financial exigency.

In order to reveal the entire scope of reorganization and solvency concerns that financially troubled colleges and universities must assess, this Note will examine the process by which colleges and universities resolve their solvency concerns. This Note will first start with determining why colleges and universities become financially unstable. This Note will then delve into the different options college and university administrators face when trying to resolve insolvency. In order to better understand these options, three case studies will be examined: one involving firing tenured faculty, another involving the merger of colleges and universities, and the last looking at changes in state legislation to grant colleges and universities more freedom in their financial decisions. The decisions college and university administrators make can lead to lawsuits, by both faculty and students, and so must not be made in haste. Finally, this Note will examine which methods are best to employ, and what colleges and universities can do both prospectively and retrospectively in order to avoid lawsuits, and also to ensure that their students are able to be educated and graduate with a degree that is meaningful to them and can help them positively contribute to society. This Note will focus on public sector schools, and leave the financial story of private colleges and universities for another scholar.

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2. *Am. Ass'n. of Univ. Professors v. Bloomfield Coll.*, 346 A.2d 615, 617 (N.J. Super. Ct. App. Div. 1975).

3. Scott Jaschik, *Layoffs Without 'Financial Exigency'*, INSIDE HIGHER ED (Mar. 2, 2010), <http://www.insidehighered.com/news/2010/03/02/exigency>.

## I. FUNDING PROBLEMS FACED BY COLLEGES AND UNIVERSITIES

With the costs of research, facilities, and additional administrative positions consuming the revenue that colleges and universities receive via tuition, government funding, endowment returns, and donations, more and more colleges and universities are having to address dire financial situations within their programs.<sup>4</sup> As the financial climate across the country turned dismal due to the 2007 to 2009 recessions, public colleges and universities also felt financial effects.<sup>5</sup> Endowment gifts contribute to the endowment fund that colleges and universities then invest in order to achieve a return on investment.<sup>6</sup> Even four years after the recession officially ended in 2009, a survey among eight-hundred thirty-one public and private colleges and universities found that for the third time in five years, there was a negative average return on endowments.<sup>7</sup> For example, in 2012, a survey among eight-hundred thirty-one institutions found that on average, the colleges and universities returned .3 percent less than was invested.<sup>8</sup> Colleges and universities with smaller funds saw greater losses than wealthier institutions.<sup>9</sup> Prior to the recession, there were double-digit returns on college and university endowment funds.<sup>10</sup> Not only were colleges and universities seeing poor performance in international equities, hedge funds, and commodities, but decreases in gifts were also adding to the negative income that endowment funds are imposing upon their budgets.<sup>11</sup> Negative returns mean, of course, that institutions are actually losing money on their investments, thus leading to financial instability. In order to continue to spend at the levels colleges and universities have historically spent, an average of 4.5 to five percent of their endowment funds annually, colleges and universities will either need to improve returns on their endowment investments, or make budgetary cuts in order to deal with the loss in revenue if the institutions continue to have years with

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4. Michael Horn, *Yale's Struggles Signal Broader Challenges Ahead for Colleges*, FORBES (Nov. 14, 2013), <http://www.forbes.com/sites/michaelhorn/2013/11/14/yales-struggles-signal-broader-challenges-ahead-for-colleges/>.

5. Michael W. Klein, *Declaring an End to "Financial Exigency"?: Changes in Higher Education Law, Labor, and Finance, 1971–2011*, 38 J.C. & U.L. 221, 223 (2012).

6. Lucie Lapovsky, *Endowment Spending: External Perceptions and Internal Practices*, COMMONFUND INST. (Mar. 2009), available at [http://www.commonfund.org/InvestorResources/PublicationsAWhite%20Papers/Endowment%20WhitePaper\\_Spending%20-%20External%20Perceptions%20and%20Internal%20Practices.pdf](http://www.commonfund.org/InvestorResources/PublicationsAWhite%20Papers/Endowment%20WhitePaper_Spending%20-%20External%20Perceptions%20and%20Internal%20Practices.pdf).

7. Kiley, *supra* note 1.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

negative returns.<sup>12</sup> Thus, while the majority of colleges and universities are financially stable, and have seen positive returns to balance out years of negative income, this is an obstacle that some will have to overcome in order to remain open.

Not only have colleges and universities seen a downturn in their investments, but due to budgetary concerns, state and federal budgets have also lessened the amounts dedicated to higher education.<sup>13</sup> Even with the passage of the 2008 reauthorization of the Higher Education Act<sup>14</sup>, which allowed the Department of Education to withhold College Access Challenge Grant funds to states failing to maintain annual gains in their higher education appropriations at least over the average of the past five years, public colleges and universities still faced budgetary concerns with the amount of state funding they receive.<sup>15</sup> With some states reducing their appropriations for operating expenses of colleges and universities by more than twenty percent between 2007 and 2009, many colleges and universities have had to make changes within their budgets in order to compensate for the loss of funding.<sup>16</sup>

As if losses in endowment funds and state funding were not enough, technological advances now threaten to change the structure of colleges and universities by allowing for easy dissemination of information without the high price tag of traditional college and university tuition. Well-respected colleges and universities, such as Harvard and MIT, have already begun to offer online education to those not enrolled in their institutions.<sup>17</sup> If this trend continues, colleges and universities without such prominence may see lowered enrollment, especially when students themselves are experiencing budgetary concerns on an individual level and may decide to pay less tuition by enrolling in a virtual version of a more well-respected college or university than they could otherwise attend.<sup>18</sup> While such an outcome may be far beyond the horizon, online classes are becoming more

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12. Kiley, *supra* note 1.

13. William Zumeta, *State Support of Higher Education: The Roller Coaster Plunges Downward Yet Again*, in THE NEA 2009 ALMANAC OF HIGHER EDUC. 29, 30 (Harold Wechsler ed., 2009).

14. Higher Education Opportunity Act of 2008, Pub. L. No. 110-315.

15. Zumeta, *supra* note 13, at 34. College Access Challenge Grant funds were created in order "to foster partnerships among federal, state, and local governments and philanthropic organizations through matching challenge grants that are aimed at increasing the number of low income students who are prepared to enter and succeed in postsecondary education." U.S. DEP'T OF EDUCATION, COLLEGE ACCESS CHALLENGE GRANT PROGRAM (2013), available at <http://www2.ed.gov/programs/cacg/index.html>.

16. Zumeta, *supra* note 13, at 36.

17. Nathan Harden, *The End of the University as We Know It*, AMERICAN INTEREST, (Dec. 11, 2012), available at <http://www.the-american-interest.com/article.cfm?piece=1352>.

18. *Id.*

and more common.<sup>19</sup> Colleges and universities will need to respond accordingly. While raising tuition may be conventional wisdom, due to the inexpensive alternative of online education resulting in certifications, colleges and universities may need to employ other devices to avoid insolvency in order to align themselves with the marketplace.<sup>20</sup> Adaptations available to colleges and universities include offering fewer tenured positions, having a smaller faculty, being more specialized and offering fewer programs and majors, and using more administration-friendly employment contracts that disempower faculty.

## II. APPROACHES TO HANDLE FINANCES

Among the ways to handle budgetary concerns, administration friendly contracts may be drafted, non-tenured faculty may be let go, tuition may be raised, higher paid non-tenured professors may be replaced with new faculty, and programs and departments may be eliminated. In order to better understand the various solutions and what may be best for various institutions, each one must be examined before applying them to case specific examples.

### Contract Drafting

When decisions are being made, an institution must abide by the terms of faculty contracts or else face litigation, and because of this, securing a favorably drafted contract is one of the most powerful protections against adverse action on the part of the institution's administrators that faculty members can have. While contract drafting is not within the skill set of most college professors, unions are able to negotiate for professors, and can draft clauses which are helpful to professors when colleges and universities are making challenging decisions arising out of financial difficulties. Prospective preventive action is almost always better than retrospective reactions, and negotiating favorable employment contracts is a proactive measure faculty may employ prior to any restructuring concerns. In the event that a college or university has unionized faculty, particularly in states that do not restrict public sector union membership, a unionized faculty has increased bargaining power and may therefore be able to negotiate helpful clauses within the employment contracts. Clauses that can be added to employment contracts in order to instill faculty rights during a restructuring phase include notice clauses, shared governance

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19. More than three-quarters of colleges and universities in a 2012 Pew Research Survey offered online classes. *College Presidents are Bigger Believers than Public in Online Classes*, PEW RESEARCH CENTER, (Dec. 17, 2012), <http://www.pewresearch.org/daily-number/college-presidents-are-bigger-believers-than-public-in-online-classes/>.

20. *See id.*



provisions, and precise definitions of financial exigency.<sup>21</sup> Notice clauses require the administration to inform unions of plans that will affect the union's members in the event of reorganization.<sup>22</sup> Shared governance clauses ensure faculty involvement and typically a formal committee or group that can offer recommendations and alternatives to a retrenchment process.<sup>23</sup> Such provisions may also require the administration to share financial information with the appropriate faculty group prior to declaring financial exigency.<sup>24</sup> College and university administrators are less likely to be able to avoid shared governance when employment contracts expressly state what specific situations demand it.<sup>25</sup>

#### Suits filed by Faculty

Once budgetary concerns become serious, action must be taken, and while these actions must fall in line with the employment contracts previously discussed, they often involve reductions in faculty. This was the case in *Shelton v. Board of Supervisors of Southern University and Agricultural and Mechanical College*, where a board meeting discussing budget concerns led to the dismissal of non-tenured faculty.<sup>26</sup> The board approved a reorganization plan after being presented with two plans at two separate meetings by the interim president of the University. The plan that was approved eliminated Joseph Shelton's position at the University, and the non-tenured employee was fired as a result. Shelton then filed suit against the University, claiming that he was unjustly let go.<sup>27</sup> The trial court found in favor of the University, and dismissed the claims against it.<sup>28</sup> The circuit court affirmed, reasoning that because the dismissal of Shelton was decided after a board meeting that discussed the new reorganization plan for the University, the administration had made a budgetary decision and his firing was bona fide and not one of retaliation.<sup>29</sup>

The firing of non-tenured faculty is the least contentious way to eliminate overhead, but also one of the least efficient in terms of eliminating costs. Non-tenured faculty are at-will employees and as long as they are fired at the end of their contract term and cannot successfully

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21. See Kristine Anderson Dougherty, Gary Rhoades & Mark Smith, *Bargaining Retrenchment*, in THE NEA 2012 ALMANAC OF HIGHER EDUCATION 51 (2012).

22. Rachel Hendrickson, Christine Maitland & Gary Rhoades, *Negotiating Academic Restructuring*, THE NEA 1996 ALMANAC OF HIGHER EDUCATION 54 (1996).

23. *Id.* at 58.

24. *Id.*

25. *Id.*

26. No. 12-30788, 2013 WL 3198765, at \*1 (5th Cir. June 25, 2013).

27. *Id.* at \*1.

28. *Id.* at \*2.

29. *Id.* at \*5.

argue they were let go for discriminatory purposes, no lawsuits will be successful upon the faculty members' departure.<sup>30</sup> However, while there is nothing unlawful about firing non-tenured employees, it is often not enough to substantially reduce overhead because they are almost always paid less than tenured faculty.<sup>31</sup> Because of this, other measures are typically necessary in order for the administration to balance their budget.

### Raising Tuition

Another option that colleges and universities may choose to employ is to raise tuition. However, because tuition often increases annually regardless of financial pressure,<sup>32</sup> because within public institutions there are various regulations in place as to how much tuition may rise, and because the paying public has begun to resist the upward pressure on tuition, it is often not the most efficient tool for administrators to use when trying to balance a college or university's budget.<sup>33</sup> In fact, despite growing financial concerns, college and university tuition increased by only 2.9 percent in the 2013 to 2014 enrollment stage, and just .9 percent after adjusting for inflation.<sup>34</sup> This was the smallest annual increase in more than three decades.<sup>35</sup> Thus, despite the ability of colleges and universities to generate

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30. *Id.*

31. *Tenured/Tenure-Track Faculty Salaries*, HIGHEREDJOBS, <https://www.higheredjobs.com/salary/salaryDisplay.cfm?SurveyID=24> (last visited Mar. 13 2015).

32. *Average Rates of Growth of Published Charges by Decade*, COLLEGEBOARD.COM, <http://trends.collegeboard.org/college-pricing/figures-tables/average-rates-growth-tuition-and-fees-over-time> (last visited Oct. 24, 2013).

33. Regulation of tuition at public colleges and universities varies by state. While some state legislatures limit the amount a public college or university can raise their tuition each year, the colleges and universities often raise tuition to the maximum limit they're allowed to impose. Some states like Texas are actually deregulating the tuition increases a public college or university can impose, resulting in a 90% tuition increase within 10 years of the law's passage. Reeve Hamilton, *If There's a Way, There's a Will to Regulate Tuition*, TEXAS TRIBUNE, Nov. 19, 2012, <http://www.texastribune.org/2012/11/19/if-theres-way-theres-will-regulate-tuition/>. Tuition deregulation is largely supported due to decreases in state funding that have led to a need for greater revenues. Those against deregulating tuition fear that by removing state legislative control over public colleges and universities it may lead to steep increases in tuition and fees, which would limit public access to higher education. While it stands unclear which direction state legislatures will move going forward, public colleges and universities must continue to work within the framework their legislatures provide, and is a budgetary concern that is largely out of the hands of the college and university administrators. Lesley McBain, *Tuition-Setting Authority and Deregulation at State Colleges and Universities*, AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES (May 2010), available at <http://www.aascu.org/policy/publications/policy-matters/2010/tuitionsettingauthority.pdf>.

34. *Average Rates of Growth of Published Charges by Decade*, *supra* note 32.

35. Mary Beth Marklein, *Colleges see a slowdown in tuition price increases*,

more funds through tuition increases, this does not seem to be the route that many are taking. This leads colleges and universities to seek other alternatives in raising revenues during hard economic times.

#### Replacing Tenured Faculty with New Hires

When the firing of non-tenured faculty and raising of tuition is not sufficient, some administrators attempt to replace their higher paid tenured faculty with new hires who will start at a lower salary. This was the case in the historic financial exigency case *American Association of University Professors v. Bloomfield College*.<sup>36</sup> In 1973, Bloomfield College, a private college in New Jersey, laid off several faculty members, but decided not to sell a large plot of land the college planned on turning into a golf course. In response, the American Association of University Professors filed suit in state court seeking to vindicate the right of tenured members of the faculty to continuous employment under the contractual undertaking of the College and to set aside the action of the board of trustees in breach of that undertaking.<sup>37</sup> The trial court found that the layoffs were not necessary and that other budget cutting measures such as selling the property could have eliminated the need to lay off faculty members.<sup>38</sup> The appellate court decided, however, that it was within the discretion of the administration to look at short-term as well as long-term budget concerns, and found that the college did not need to sell that property prior to being able to lay off faculty members.<sup>39</sup> While the appellate court held that the College was in a bona fide state of financial exigency, it also held that the College had not exercised good faith when it had terminated tenured faculty.<sup>40</sup> As a result, the appellate court affirmed the trial court's ordering of specific performance of reinstating the laid off faculty members.<sup>41</sup> It is important to note that the appellate court did not dispute that Bloomfield College was in a state of financial exigency, but merely ruled that the financial exigency was not a bona fide cause for the decision to terminate the tenured faculty.<sup>42</sup> The appellate court was therefore able to uphold the ruling of the trial court that good faith was not used in deciding to fire the tenured faculty, while also establishing a victory for colleges and universities

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USA TODAY, Oct. 23, 2013, <http://www.usatoday.com/story/news/nation/2013/10/23/college-tuitions-rising-more-slowly/3151897//>.

36. 346 A.2d 615 (N.J. Super. Ct. App. Div. 1975).

37. *Id.* at 615.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Bloomfield Coll.*, 346 A.2d at 618.

42. *Id.*

facing financial exigency. At least in New Jersey, colleges and universities were granted broad discretion in budgetary decisions, but a check on the institutions remains. The victory for faculty was achieved through the court's decision that good faith was necessary in order to fire tenured faculty during financial exigency. It thus upheld a check on the otherwise unrestrained ability of colleges and universities to make whatever decisions they deemed necessary in order to balance the budget.

After *Bloomfield College*, other state courts have followed suit, granting colleges and universities broad discretion in their business decisions when declaring financial exigency.<sup>43</sup> Institutions are not forced to liquidate their assets prior to laying off even tenured faculty. While the decisions of the boards of trustees of colleges and universities must be made in good faith, firing tenured faculty need not be the last resort available to board of trustees. Cases since *Bloomfield College* have been able to use this decision as support for using various methods, including firing tenured faculty, when trying to avoid insolvency.<sup>44</sup> In order to determine whether the firing of tenured faculty during the time of financial exigency has been done in good faith, the following factors are considered: (1) the board's motivation for its action; (2) the adequacy of the institution's funds; (3) the overall financial condition of the institution; (4) the use of cost or money saving measures before termination of faculty; and (5) the efforts used to find a solution other than terminating faculty.<sup>45</sup> This enables colleges and universities to enjoy freedom in making financial decisions, and allows them to use the firing of tenured faculty as a legitimate approach when made in good faith. Colleges and universities are thus able to avoid employing other cost-saving options that may be less desirable than firing tenured faculty when declaring financial exigency.

#### Downsizing or Eliminating Programs and Departments

Another route that colleges and universities sometimes employ is to eliminate entire departments and programs, and with it, the faculty who

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43. See, e.g., *Scheuer v. Creighton Univ.*, 260 N.W.2d 595 (Neb. 1977) (ruling in favor of the University where an assistant pharmacy professor sought reinstatement after he was terminated on the ground of financial exigency); *Refai v. Cent. Wash. Univ.*, 742 P.2d 137 (Wash. Ct. App. 1987) (refusing to grant a tenured associate professor reinstatement after being terminated, even though the university hired other full-time and part-time faculty during financial exigency).

44. See, e.g., *Krotkoff v. Goucher Coll.*, 585 F.2d 675 (4th Cir. 1978) (ruling that tenure did not protect former professor's employment in the case of a bona fide dismissal if the college is confronted with financial exigency); *State Coll. Locals v. State Bd. of Higher Ed.*, 436 A.2d 1152 (N.J. Super. Ct. App. Div. 1981) (finding that the board was within its rule-making capacity and its decisions to reduce the size of the management staff in the event of financial exigency did not violate tenure statutes).

45. *Krotkoff*, 585 F.2d at 681.

teach within the departments and programs.<sup>46</sup> Colleges and universities can also implement horizontal budget cuts, in which every department faces the same budget cut, in proportion to its share of the institution's budget, in the hopes that there are elements of every program that are unnecessary and could save substantial amounts without the institution needing to single out particular programs.<sup>47</sup> However, because this type of budget cutting does not typically suffice on its own, shutting down entire programs is often necessary for colleges and universities experiencing drastic budgetary concerns.<sup>48</sup>

Particularly once the Great Recession hit, drastic cuts became necessary, but the trend continues even after the economy has begun to rebound. In June 2012, The University of California System consolidated or eliminated more than one hundred eighty programs.<sup>49</sup> The University System of Louisiana likewise cut two hundred seventeen academic programs between 2010 and 2012.<sup>50</sup> Other colleges and universities continue to consider this option. In December 2013, Minnesota State University, Moorhead announced its plan to phase out five low-enrollment majors and also merge some academic departments.<sup>51</sup> In order to save the more profitable departments or programs, a college or university will typically establish a procedure to evaluate its programs before selectively terminating, merging, or downsizing certain programs.<sup>52</sup> Most administrators of colleges and universities agree that in evaluating different programs and departments, the college or university's short- and long-term aspirations should be considered.<sup>53</sup> Program reorganization is often preferred to declaring financial exigency for the entire college, because it allows huge cost reductions while still allowing the programs that remain to have high

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46. *Beukas v. Bd. of Trs. of Fairleigh Dickinson Univ.*, 605 A.2d 776 (N.J. Super. Ct. Law Div. 1991).

47. Hazel G. Beh, *Downsizing Higher Education and Derailing Student Educational Objectives: When Should Student Claims for Program Closures Succeed?*, 33 GA. L. REV. 155, 162–63 (1998).

48. *Id.* at 163.

49. *Actions to Address Budget Shortfalls*, UNIV. OF CAL. (June 2012), [http://budget.universityofcalifornia.edu/wp-content/uploads/2012/07/uc\\_budget\\_shortfall\\_actions.pdf](http://budget.universityofcalifornia.edu/wp-content/uploads/2012/07/uc_budget_shortfall_actions.pdf).

50. *Fiscal and Operational Facilities*, UNIV. OF LA. SYS. (Dec. 2010), available at <http://www.ulsystem.net/assets/docs/searchable/spotlights/UL%20System%20Fiscal%20and%20Operational%20Efficiencies%2012-10.pdf>; *Joint Legislative Committee on the Budget*, LA. STATE UNIV. SYS., (Nov. 9, 2012), available at [http://www.lsusystem.edu/docs/budget/JLCB%20Presentation%2011092012/LSU%20System%20Presentati on%20to%20JLCB\\_11-9-12.pdf](http://www.lsusystem.edu/docs/budget/JLCB%20Presentation%2011092012/LSU%20System%20Presentati on%20to%20JLCB_11-9-12.pdf).

51. Alex Friedrich, *Administrative Proposal would Eliminate Projected Deficit*, MINN. PUBLIC RADIO (Dec. 5, 2013), <http://blogs.mprnews.org/oncampus/2013/12/msu-moorhead-announces-proposed-budget-cuts/>.

52. *Id.*

53. Beh, *supra* note 47, at 166.

enrollment and financial support.<sup>54</sup>

### III. TYPES OF LAWSUITS FACED

The two most prevalent types of lawsuits that colleges and universities face after making budget cuts center on (1) the firing of faculty, and (2) cutting programs and majors within the college or university. Employment lawsuits by faculty who were fired are the most common, with student grievances after their program or department was eliminated recently becoming more popular.

Courts reviewing faculty terminations due to financial exigency or program discontinuance by colleges and universities have focused on procedural rights, the violation of which has been alleged by the plaintiff faculty members.<sup>55</sup> Faculty terminations due to financial exigency require a four-step analysis. That analysis involves: (1) whether the plaintiff had standing to sue; (2) whether the trial court had subject matter jurisdiction over the suit and personal jurisdiction over the defendant; (3) whether the institution had acted in good faith when it said that financial exigency required plaintiff's termination; and (4) whether the process by means of mean plaintiff was terminated was fair.<sup>56</sup> When deciding faculty cases, the courts look at this four-step analysis in order to find that the college or university acted properly or else that the plaintiff faculty member(s) was wrongfully fired.<sup>57</sup> While the issues of standing and jurisdiction are common to lawsuits generally, the matters of the bona fides of the financial exigency and whether the college or university used a fair process when deciding to fire the plaintiff are unique to financial exigency cases concerning faculty.<sup>58</sup> Public colleges and universities have historically been held to a lower standard by courts than their private counterparts when determining whether or not their actions regarding financial exigency and program and department discontinuance were justified.<sup>59</sup> This effect may be caused by the fact that faculty within a public college or university are granted greater contractual protections once a bona fide finding of financial exigency has been made than their private college and university counterparts.<sup>60</sup>

In *Bloomfield College*, the courts had to evaluate the determinations

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54. Rachel Hendrickson et. al., *Negotiating Academic Restructuring*, in THE NEA 1996 ALMANAC OF HIGHER EDUC. 51, 56 (1996).

55. Robert Charles Ludolph, *Termination of Faculty Tenure Rights Due to Financial Exigency and Program Discontinuance*, 63 U. DET. L. REV. 609, 628 (1986).

56. *Id.* at 649.

57. *Id.*

58. *Id.*

59. *Id.* at 633.

60. Ludolph *supra* note 55.

made by a planning commission composed of trustees, faculty, students and staff, which resulted in the laying off of tenured faculty members.<sup>61</sup> As previously discussed, the appellate court found that there was substantial and credible evidence to support the trial court's finding that the College did not use good faith in the process of laying off tenured faculty, and so the laid off faculty were reinstated.<sup>62</sup>

In *Wise v. Ohio State University*, the matter at issue was whether or not the employee's firing constituted age discrimination or if it was merely a decision regarding the financial stability of his program when his position was eliminated.<sup>63</sup> In August of 2003, Kenneth Wise, an agricultural technician within the dairy unit at The Ohio State University, was notified that his position was being abolished due to a lack of funds and to the reorganization of the unit in which he worked.<sup>64</sup> Wise was notified that he could displace another employee within a different department who held the same job classification with fewer retention points, but Wise declined.<sup>65</sup> The administration then put Wise on a layoff list and notified him that if another position in his job classification became available, they would notify him.<sup>66</sup> Ultimately, Wise was not re-employed or reinstated, so his employment with the university ended.<sup>67</sup> Wise subsequently filed a suit against the University, alleging age discrimination, disability discrimination, retaliation, and wrongful discharge in violation of public policy.<sup>68</sup> At trial, the chair of the University's Department of Animal Sciences testified that in response to budget reductions, the department had to restructure its dairy programs.<sup>69</sup> After the department chair consulted with a professor within the department, Wise's position was identified as one of the three that could be eliminated because other positions within the unit could perform those duties in addition to their current obligations.<sup>70</sup> Wise argued that because his duties were distributed to other employees, these younger employees effectually replaced him.<sup>71</sup>

The trial court, however, found that a person is not replaced when another employee is assigned to perform the person's duties in addition to

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61. *Am. Ass'n of Univ. Professors v. Bloomfield Coll.*, 346 A.2d 615 (N.J. Super. Ct. App. Div. 1975).

62. *Id.*

63. No. 11AP-383, 2011 WL 6649079, at \*2 (Ct. App. Ohio Dec. 20, 2011).

64. *Id.* at \*1.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Wise*, 2011 WL 6649079 at \*1.

69. *Id.* at \*3.

70. *Id.* at \*3.

71. *Id.*

the employee's current duties.<sup>72</sup> Likewise, the trial court found that other employees hired after Wise were not hired to complete the same job function as Wise so the University was within its rights in hiring new employees and assigning Wise's duties to others.<sup>73</sup> The appellate court held that because determinations of Wise's position were based upon budget cuts, and because Wise was unable to prove any sort of age discrimination, the University was justified in eliminating his position.<sup>74</sup> This case therefore upholds the ability of colleges and universities, in Ohio, at least, to merge positions as a cost-saving measure where discrimination cannot be proven.

The second type of lawsuit that colleges and universities face after making large budgetary cuts that results in the downsizing or elimination of a program or department is that filed by their students. In determining these cases, courts have used a two part test: (1) whether the college or university used good faith to determine the program closure, and (2) whether the college or university dealt fairly with the students in light of the decision to close the program.<sup>75</sup> The landmark case that follows this two-part test is *Beukas v. Board of Trustees of Fairleigh Dickinson University*, in which dental students filed suit after the private dental college was closed.<sup>76</sup> The trial court held that in the absence of showing arbitrariness, bad faith, or lack of prompt notice by university officials of their intention to close the dental college, the students failed to state a claim.<sup>77</sup> In the dental college bulletin, the University had posted that the administration reserves "the right in its sole judgment to make changes of any nature in the college's academic program, courses, schedule, or calendar whenever in its sole judgment it is deemed desirable to do so."<sup>78</sup> After accepting a new class of dental students in the summer of 1989 and proceeding with its current ones, the University had been notified that the governor's budget had appropriated approximately twenty-five percent less funds to the dental college than in the previous year.<sup>79</sup> Due to this loss in state funds, the university incurred a deficit for the dental college.<sup>80</sup> The president of the dental college recommended that there be faculty consultations regarding the closing of the school, that the freshman class be suspended, that the search for a new dean be suspended, that the dental college remain open an additional two years so that current juniors could

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72. *Id.* at \*4.

73. *Wise*, 2011 WL 6649079 at \*4.

74. *Id.*

75. Beh, *supra* note 47, at 192.

76. 605 A.2d 776 (N.J. Super. Ct. 1991).

77. *Id.* at 777.

78. *Id.* at 778.

79. *Id.*

80. *Id.*



still graduate, and that after those subsequent two years, the dental college would close.<sup>81</sup> Dental students were told of the decisions about a year in advance of when the university planned to close and were also offered additional clinical and academic instruction so as to facilitate their transfer to other dental schools.<sup>82</sup> The college also coordinated with the State Dental Accreditation Society to ensure that the dental college retained its accreditation up until it was closed.<sup>83</sup>

The students argued that upon their being accepted into the dental college, a contractual obligation came into existence.<sup>84</sup> They argued that by paying their first year's tuition, a complete and binding contract arose for the entire educational program culminating in a D.M.D. degree.<sup>85</sup> The students claimed that the college breached its contract with those students and that notwithstanding any claims of financial exigency by the University, the University was not able to argue impossibility of performance of their contractual obligation.<sup>86</sup>

The trial court stated the issue as whether, in determining to permanently close the dental college, the University infringed upon any legal rights of the students, which would entitle them to redress their grievances through an award of damages.<sup>87</sup> It cited *In re Antioch University* where that court refused to interfere with a university's autonomy where the relief sought was equitable in nature.<sup>88</sup> The trial court identified the obligations owed by a university to its students under circumstances in which the university has unilaterally determined to terminate an entire college for financial reasons.<sup>89</sup> The trial court also discussed whether a conflict should be resolved under classic contract doctrine where the relevant obligations are contractual in nature.<sup>90</sup> The court sought to determine what legal theory would best apply to the situation if contractual doctrine should not be followed.<sup>91</sup> The trial court decided that the university-student contract is an implied contract of mutual obligations.<sup>92</sup> It is a quasi-contract, which is

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81. *Beukas*, 605 A.2d at 778–79.

82. *Id.* at 779.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Beukas*, 605 A.2d at 779.

87. *Id.*

88. 418 A.2d 105, 113 (D.C. Ct. App. 1980).

89. *Beukas*, 605 A.2d at 781–82. The court held that a college or university has an obligation to allow the student to continue his or her studies until graduation if the student is willing and eligible to continue.

90. *Id.* The court discussed different jurisdictions' understanding of whether or not a contractual nature was present between colleges and universities and their students, but did not make its own determination on the issue.

91. *Id.* at 783.

92. *Id.*

created by law for reasons of justice without regard to expressions of assent on the part of either party by either words or acts.<sup>93</sup> The trial court concluded that applying this quasi-contract theory to resolve university-student conflicts over an administrative decision to terminate a college or program for financial reasons is the most effective way to avoid injustice to both the university and its students.<sup>94</sup> Because of this, the court said the judicial inquiry should be directed toward whether the decision-making is bona fide and whether the college or university acted in good faith and dealt fairly with the students while implementing their decision.<sup>95</sup> Since the trial court found that the University acted in a bona fide manner in its dealings with the students, the students were not successful in a suit against the University.<sup>96</sup> The appellate court affirmed the decision of the trial court and added only that the students relied on the dental college catalog, but that the bulletin contained a significant reservation of rights that reinforced the actions of the University.<sup>97</sup>

#### IV. CURRENT CASE STUDIES

Against this sparse precedential background regarding colleges and universities making budget cuts through either eliminating faculty or departments and programs, a formal discussion of how colleges and universities are currently handling their budgetary struggles is an important element of the analysis of college and university reorganization. In order to get a proper understanding of the difficulties involved when facing financial strain, this Note will look at the University System of Georgia's consolidation and closure of colleges and universities in its system through mergers, Florida State University's firing of twenty one tenured faculty members as well as the consequent reinstatement of these faculty members, and lastly, the Virginia legislature's changing of the climate for reorganization within its public colleges and universities.

##### University System of Georgia

Looking first at the University System of Georgia, in January 2013, the Board of Regents of the University System of Georgia announced that it was going to consolidate eight of the system's thirty-five colleges and universities in order to meet budget demands.<sup>98</sup> Of the eight campuses

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93. *Id.*

94. *Id.*

95. *Beukas*, 605 A.2d at 784.

96. *Id.*

97. *Beukas v. Bd. of Trs. of Farleigh Dickinson Univ.*, 605 A.2d 708 (N.J. Super. Ct. App. Div. 1992).

98. Paul Fain, *Major Mergers in Georgia*, INSIDE HIGHER ED (Jan. 6, 2012), <http://www.insidehighered.com/news/2012/01/06/georgia-university-system-proposes->

sought to be merged in pairs, only two campuses were in the same city, with the other three merged institutions some thirty miles away from each other.<sup>99</sup> Physical separation was not the only cause for concern among those hearing of the plan, however, and university officials cited the need to maintain each campus's individual culture despite the mergers.<sup>100</sup> With a significant cut in state tax revenues, however, officials saw no other choice; in fact Richard Staisloff, an expert on college finances, has stated that by implementing consolidations such as those that Georgia is effecting, colleges and universities can save money on shared courses, insurance, audit functions, as well as other areas, all while maintaining the academic quality of the programs that the college or university provides.<sup>101</sup> While this plan was initially doubted in terms of the ability to actually merge campuses that are so far apart from one another,<sup>102</sup> not only is the University System of Georgia merging the eight schools it initially announced, but additional mergers have also been proposed, and implementation has begun.<sup>103</sup>

With regard to the latest merger that has been announced, that of Kennesaw State University and Southern Polytechnic State University, the details of the merger were largely kept secret until the announcement was made that the two institutions would be merged.<sup>104</sup> Under the proposal, all campuses will remain open until 2015, when the merged institution starts admitting new students.<sup>105</sup> There were less than the fifteen days between the announcement of the plan to merge and the regents' vote on the merger. While students protested, they were unable to voice an opinion at the meeting due to a fifteen-day notice requirement for public speech at regents' meetings.<sup>106</sup> The regents were under scrutiny due to their lack of

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consolidation-8-campus. In merging the colleges and universities, the University System of Georgia follows six principles for consolidation: (1) increase opportunities to raise education attainment levels (2) improve accessibility, regional identity, and compatibility, (3) avoid duplication of academic programs while optimizing access to instruction, (4) create significant potential for economies of scale and scope, (5) enhance regional economic development, and (6) streamline administrative services while maintaining or improving service level and quality. *Regents Approve Principles for Consolidation of Institutions*, UNIV. SYS. OF GA. (Nov. 8 2011), [http://www.usg.edu/news/release/regents\\_approve\\_principles\\_for\\_consolidation\\_of\\_institutions](http://www.usg.edu/news/release/regents_approve_principles_for_consolidation_of_institutions).

99. Fain, *supra* note 98.

100. *Id.*

101. *Id.*

102. *Id.*

103. Ry Rivard, *Merging Into Controversy*, INSIDE HIGHER ED (Nov. 6, 2013), <http://www.insidehighered.com/news/2013/11/06/secret-merger-now-public-meets-opposition-georgia>.

104. *Id.*

105. *Id.*

106. *Id.* Due to a restriction in the bylaws, there must be 15 days notice by

advance notice, but this latest merger is going more smoothly than the four previous mergers went, with some credit to the fact that the name, Kennesaw State University, was decided upon at the time of the announcement.<sup>107</sup> With the previous mergers, a source of significant contention among the colleges and universities was what name the new merged institution would adopt.<sup>108</sup>

Although the regents have already consolidated eight universities, the realized savings as of November 2013 were less than one percent of the total operating budget.<sup>109</sup> The system expects that the first round of mergers will save between 5 million and 7.5 million dollars in 2014, which is about .1 percent of the total 7.4 billion dollar operating budget for the Georgia University System, which now has thirty-one colleges in it.<sup>110</sup> State funding contributes about 1.9 billion dollars into the budget.<sup>111</sup> In addition to saving just .1 percent of the operating budget, most of the savings that have been projected will be for only the first year of the consolidation; it is unknown what the system expects to save in the years following.<sup>112</sup> Within these first year consolidation savings, however, few layoffs have occurred, and none of the campuses had been closed.<sup>113</sup> Within the University System of Georgia, it seems that while the back door meetings have been scrutinized, the mergers and cost saving decisions have not caused the system to break contracts or to layoff many members of the

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outsiders prior to any meeting in order for outside participation. *Id.* Because the administration announced the merger with less than 15 days before the meeting in which it would be voted on, student, faculty, and community members were unable to voice their opinions within the meeting, in accordance with the bylaw provision requiring notice to attend. *Id.*

107. *Id.* In an interview, associate vice chancellor of the Georgia University System Shelley Nickel stated that system officials have learned it is difficult for campus officials to settle on a new name. *Id.* In naming the institution prior to implementation of the merger, it bypasses the process being held up by officials negotiating over what to name the institution. *Id.* Though agreeing upon the name of an institution may seem like a menial decision, when two institutions are being merged there is often contention in determining what name will live on not only on behalf of the administrations, but also students who may have a different institution on their diploma than otherwise planned on. *Id.*

108. *See Augusta Commission Considers College Name*, GA. PUB. BROAD. (Aug. 20, 2012), <http://www.gpb.org/news/2012/08/20/augusta-commission-considers-college-name> (reporting continued controversy over deciding the name of the merged institution); *cf.* Lesley McBain, *College and University Mergers: An Update on Recent Trends*, AM. ASS'N OF STATE COLL. & UNIV. (May 2012) (explaining the outrage felt when Rutgers-Camden was told it would lose its name in a merger with Rowan University).

109. Rivard, *supra* note 103.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

staff and faculty.<sup>114</sup>

In order to uphold some sense of transparency in the University System of Georgia case, the actual implementation of the mergers has been more collaborative than the initial decision to merge the colleges and universities was.<sup>115</sup> The first steps of a merger include creating implementation groups consisting of faculty, staff, students, alumni, foundation, and community leaders.<sup>116</sup> A president is then designated among those in the group, and a reporting format with key indicators is established.<sup>117</sup> The tasks of the implementation groups include academic, student, external, and operations duties.<sup>118</sup> The academic tasks range from coordinating with program-based accreditation to addressing program differences between the two schools and consolidating tenure and promotion process.<sup>119</sup> The student tasks include combining athletic programs, determining a strategy for tuition, merging information systems, and revising bylaws and student handbooks.<sup>120</sup> The external tasks include developing legislative relationships of the colleges, naming and branding the institution, and addressing alumni and foundation group issues and endowment restrictions.<sup>121</sup> Operations tasks include merging the financial systems, updating contractual and rental agreements, analyzing the impact of the merger on bonds, ensuring adequate audit coverage, consolidating risk management, and transitioning legal agreements and IT security.<sup>122</sup>

In addition to the mergers between colleges within the University System of Georgia, the Georgia Institute of Technology, a university within the system, has also admitted its first four hundred and one students to its new low-cost online master's degree program in computer science.<sup>123</sup> The spring of 2014 was the pilot season. It is a small version of what the school

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114. Rivard, *supra* note 103.

115. *Recommended Consolidations*, BD. OF REGENTS OF THE UNIV. SYS. OF GA. (2012), available at <http://www.usg.edu/docs/consolidations.pdf> (PowerPoint presentation). In order to maintain transparency, along with collaborating with students, staff, alumni, faculty, and community members, the University System of Georgia has also posted resources online that list the profiles of each college, along with the opportunities gained and challenges that will be faced in going through with the merger. Profiles for all 5 mergers are currently available through their website.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Recommended Consolidations*, *supra* note 115.

121. *Id.*

122. *Id.*

123. Carl Straumshein, *The First Cohort*, INSIDE HIGHER ED (Dec. 13, 2013), <http://www.insidehighered.com/news/2013/12/13/georgia-tech-admits-first-cohort-ahead-online-masters-degree-program-launch>.

hopes to become a ten thousand student program by its third year.<sup>124</sup> In a joint venture with AT&T, which invested two million dollars to subsidize the program, the school will split a projected 4.7 million dollars in revenue with AT&T, with the school taking in sixty percent and AT&T forty percent.<sup>125</sup> This program allows those not geographically near the program to enroll, and earn a graduate degree without ever stepping foot on campus.<sup>126</sup> With this innovative educational tool, and in addition to the consolidations, the University System of Georgia is raising the bar for other college and university systems in order to reduce costs and expand revenue.

#### Florida State University

Turning now to tenured faculty layoffs, this Note will now discuss the arbitration proceeding brought by faculty members when Florida State University laid off twenty-one tenured faculty members in 2010 without declaring financial exigency. The collective bargaining agreement between Florida State University and the faculty and staff employed by the University provided for final and binding arbitration as the mechanism to be used to resolve any disputes or grievances with employment contracts.<sup>127</sup> Because of this, the proceeding stayed out of the courts, and the ruling by the arbitrator was binding on both parties. The arbitrator's decision to side with the faculty resulted in the University's reinstatement of each of the tenured faculty affected.<sup>128</sup>

In an eighty-three page opinion, the arbitrator found that the layoffs executed by Florida State University were arbitrary, capricious, and unreasonable.<sup>129</sup> However, the arbitrator did not accept all of the grievances filed by the tenured faculty's unions.<sup>130</sup> He largely found that the University was within its rights to eliminate various non-tenure track positions, but that in the case of tenured faculty, there were multiple violations of the rights of the tenured faculty members.<sup>131</sup> The arbitrator also concluded that the decision-making process used by the University unjustly favored some professors over others, with a disregard for the

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124. *Id.*

125. *Id.*

126. *Id.*

127. Fla. St. Univ. Bd. of Trustees v. United Faculty of Fla. (2010) (Sergent, Arb.), available at <http://www.uff-fsu.org/art/ArbitrationAwardHighRes.pdf>.

128. Richard Kerr, *Fired Tenured Faculty Members Reinstated at Florida State*, SCIENCE INSIDER (Nov. 8, 2010), <http://news.sciencemag.org/funding/2010/11/fired-tenured-faculty-members-reinstated-florida-state>.

129. Scott Jaschik, *Tenured Jobs Saved*, INSIDE HIGHER ED (Nov. 8, 2010), [http://www.insidehighered.com/news/2010/11/08/florida\\_state](http://www.insidehighered.com/news/2010/11/08/florida_state).

130. *Id.*

131. Fla. St. Univ. Bd. of Trustees, *supra* note 127, at 56.

collective bargaining agreement that the University was bound to uphold.<sup>132</sup> Under that agreement, the University was supposed to consider length of service in deciding which faculty members to lay off.<sup>133</sup> The arbitrator found that, had the University considered this element, its decision regarding who to layoff would have been different from its actual decision, as many of the laid off faculty members had much more experience than others whose jobs were protected after the layoffs.<sup>134</sup> While it was not in dispute that Florida State University faced deep budget cuts, the arbitrator found that university officials used arbitrary means in order to select who would be let go.<sup>135</sup> The finding by the arbitrator is consistent with the result in *Bloomfield College* in holding Florida State University to the standard of good faith judicially required of it, even when it was facing financial pressures.<sup>136</sup>

The arbitrator did not find solely for the faculty, however, and his finding actually has raised new questions about the practice of making budget cuts. The arbitrator identified certain departments as more subject to budget cuts than others.<sup>137</sup> He looked at the cost per degree of each program and found that the University's goal of focusing cuts on departments with high costs should have allowed some programs to escape those cuts.<sup>138</sup> In the Department of Anthropology, for example, net tuition exceeded that of fourteen of the seventeen departments in the College of Arts and Sciences, yet it had been subject to deep cuts.<sup>139</sup> Meteorology, however, was one of the departments with low tuition revenues, yet the University chose not to impose many cuts on it.<sup>140</sup> The arbitrator thus found that, from a budget perspective, not all of the cuts made sense.<sup>141</sup>

### Virginia Legislation

Lastly within the case studies, this Note will look at the Virginia legislature, and the legislation it has enacted in order to allow public colleges and universities more freedom when avoiding declaring financial exigency while experiencing budget problems. Virginia first sought to grant greater college and university autonomy in restructuring with the

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132. Jaschik, *supra* note 129. Collective bargaining agreements can be an extremely useful tool for faculty to employ prior to any employment disputes.

133. *Id.*

134. *Id.*

135. Jaschik, *supra* note 129.

136. *Am. Ass'n of Univ. Professors v. Bloomfield Coll.*, 346 A.2d 615 (N.J. Super. Ct. App. Div. 1975).

137. Jaschik, *supra* note 129.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

Restructured Higher Education Financial and Administrative Operations Act of 2005.<sup>142</sup> In 2011, the Virginia legislature passed a bill that was signed into law by the governor and amended the 2005 Act.<sup>143</sup> It affords Virginia's public colleges and universities more restructuring abilities than that state's colleges and universities had previously enjoyed.<sup>144</sup> Some of these abilities affect tenured faculty.<sup>145</sup> In exchange for committing to twelve state goals, state colleges and universities in Virginia are given opportunities for greater institutional autonomy, while tuition and fee responsibility reside solely with the institution's Board of Visitors.<sup>146</sup> Institutions are located somewhere on three tiers and have greater autonomy within the higher tiers.<sup>147</sup> The 2011 legislation also allows for greater financial incentives by meeting more performance measures in connection with it.<sup>148</sup>

The Virginia legislation classifies its public colleges and universities into one of three levels pertaining to financial and administrative operational authority.<sup>149</sup> All Virginia public colleges and universities enjoy at least level I authority, which grants minimum operational authority to the institution.<sup>150</sup> By entering into a memorandum of understanding with the governor and corresponding cabinet secretaries, colleges and universities may earn level II authority.<sup>151</sup> Level II status grants Virginia public colleges and universities additional authority in two of the following three areas: (1) capital outlay; (2) information technology; and (3)

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142. VA. CODE ANN. § 23-38.88 (2014). The Governor worked with the legislature in order to outline a public agenda of 11 performance goals for public colleges and universities, which led to the passage of the Restructured Higher Education Financial and Administrative Operations Act of 2005. The 2005 Act required each public college and university's board of visitors to pass a formal resolution that year agreeing to meet the state's goals, and making the boards responsible for ensuring that the state goals were actually met. The State Council of Education for Virginia performs an annual review of the colleges and universities and provides written certification with the results of the review. *Higher Education Opportunity Act (Restructuring)*, STATE COUNCIL OF HIGHER EDUC. FOR VA., <http://www.schev.edu/restructuring/restructuring.asp> (last visited Feb. 13, 2015).

143. Virginia Higher Education Opportunity Act, V.A. CODE ANN. § 23-38.87:10 (2014).

144. VA. CODE ANN. § 23-9.2:3.02 (2014).

145. STATE COUNCIL OF HIGHER EDUC. FOR VA., *supra* note 142.

146. *Id.* The state goals set forth the following priorities: (1) access; (2) affordability; (3) academic offerings; (4) academic standards; (5) student progress and success; (6) articulation and dual enrollment; (7) economic development; (8) research; (9) enhancing K-12; (10) six-year plans; (11) finance and administrative; and (12) campus safety and security.

147. *Id.*

148. *Id.*

149. *Id.*

150. STATE COUNCIL OF HIGHER EDUC. FOR VA., *supra* note 142.

151. *Id.*



procurement.<sup>152</sup> The highest level, level III, is granted to a select group of institutions through a management agreement among the college or university's board of visitors, the governor, and the general assembly. Level III colleges and universities are given operational authority in the areas of capital outlay, information technology, procurement, human resources (including faculty employment issues), and finance.<sup>153</sup>

Allowing autonomy so long as the institutions are still accountable to the government of Virginia, and increasing this autonomy based upon the amount of accountability, ensures that while Virginia public colleges and universities are able to make decisions based on human resources without answering for their decisions, they still must operate within the confines of the agreement they have established with their government. Thus, although those colleges or universities may be able to make decisions that would otherwise be adverse to their employees, they ultimately must answer to the government and assure that the decision was in accordance with the agreed upon commitment to the initiatives required by the state. While this may not be the best move from the faculty perspective, the statute seeks to provide student benefits, and not merely provide unguarded authority to the schools' administration. The law seeks to help students with limited financial resources to get into college by increasing access, affordability, and academic offerings and standards.<sup>154</sup> From an administrative view, the law also calls for six-year plans, finance and administrative efficiencies, and campus safety and security.<sup>155</sup> Because of all these positive goals, it can plausibly be argued that the law works to the benefit of current students at the institutions while also allowing the college or university to remain sustainable.<sup>156</sup>

#### V. HOW BEST TO PROCEED

Budgetary concerns cannot be ignored or avoided. With the advancement of new educational technology, ups and downs in the economy, and state budgetary concerns, those concerns are becoming more and more commonplace. Because declaring financial exigency is a drastic step for any college or university and because state law usually requires administrators to follow a legally prescribed path in considering other options prior to declaring financial exigency, methods in which colleges and universities can manage their budgetary concerns while avoiding this fate are most desirable.<sup>157</sup> Colleges and universities can reduce salaries of

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152. *Id.*

153. *Id.*

154. *Id.*

155. STATE COUNCIL OF HIGHER EDUC. FOR VA., *supra* note 142.

156. *Id.*

157. *See* Klein, *supra* note 5, at 258.

administration and staff, temporarily suspend institutional contributions to retirement plans,<sup>158</sup> and also put furloughs in place in order to address grim financial circumstances.<sup>159</sup> When all of these measures prove insufficient, financial exigency is the last option that some colleges or universities may employ.<sup>160</sup> However, another way of avoiding having to declare financial exigency is to put a framework in place prior to the signs of budgetary problems, and to draft contracts with management friendly clauses in case of financial distress. However, the college or university is not the only party that sees contracts as a powerful way to control financial issues; it is also in the best interest of the faculty for it to build strong employment contracts for themselves. A balance must be struck in order to temper both the faculty's and the administrations' self-interest.

Looking first at the faculty side of employment agreements, there are two different perspectives within it: (1) that of faculty within right-to-work states, and (2) that of faculty in states without such legislation. Right-to-work legislation eliminates the ability of unions and employers to require employees to join a labor union in order to get or keep a job.<sup>161</sup> Because of this, many people in right-to-work states refuse to join the union that represents them, thereby avoiding having to pay union fees. For that reason, membership in, and the resources of, the unions in these states often decline.<sup>162</sup> Public colleges and universities within the twenty-four states that have passed right-to-work legislation have limited force behind their unions because membership tends to decline when it is not mandatory. Furthermore, the state funding colleges and universities receive can be further constrained if the institutions' contracts are not in accordance with their states' right-to-work laws.<sup>163</sup> However, regardless of the actual strength of the union involvement, faculty protections continue to exist, but

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158. See, e.g., Tamar Levin, *Brandeis Halts Retirement Payments*, N.Y. TIMES, May 21, 2009, <http://www.nytimes.com/2009/05/22/education/22college.html> (where Brandeis University announced it would suspend contributions to retirement funds as a cost saving measure for the university.)

159. Klein, *supra* note 5, at 258.

160. *Id.*

161. *Right to Work States*, NAT'L RIGHT TO WORK LEGAL DEF. FOUND., <http://www.nrtw.org/rtws.htm> (last visited Feb. 13, 2015). See, e.g., Rod Meloni, *Right to Work: Oh the Outrage!*, CLICK ON DETROIT (Mar. 19, 2013), <http://www.clickondetroit.com/consumer/4yourmoney/Right-to-Work-Oh-the-Outrage/19385206>.

162. Steven Greenhouse, *Share of the Work Force in a Union Falls to a 97-Year Low, 11.3%*, N.Y. TIMES, Jan. 23, 2013, <http://www.nytimes.com/2013/01/24/business/union-membership-drops-despite-job-growth.html>.

163. *Right to Work States*, *supra* note 161 (explaining how colleges and universities in Michigan attempted to create long-lasting contracts with unions prior to right to work legislation becoming in effect, and the legislature threatened to withhold funding as punishment).

those protections may be greater where the union has a stronger voice behind it.

Within faculty contracts, there are several types of provisions that can grant protection to tenure-track faculty members in the case of financial exigency, such as provisions including faculty involvement in reorganization by means of shared governance, provisions that address how restructuring affects tenure rights, and provisions for the rights of non-tenure track faculty.<sup>164</sup> It is extremely valuable for faculty to negotiate shared governance (or other forms of faculty involvement) in the reorganization process. Shared governance structures ensure faculty input into the decision-making process. Such structures typically consist of a formal committee, association, or senate in which the college or university is contractually obligated to involve the group in the event of a financial exigency or when program elimination is necessary.<sup>165</sup> The group is given the opportunity to offer advice, recommendations, and alternatives that must be forwarded to the board of trustees or other decision-making authority.<sup>166</sup> Contracts of this sort may mandate involvement of the relevant faculty entity if layoffs are necessary.<sup>167</sup> By ensuring faculty involvement when program eliminations or mergers take place or seem imminent, faculty may be able to create stability and lessen the negative consequences of those actions on the faculty. While layoffs in such a situation may be inevitable, by having faculty involvement throughout the process, decisions can be made that consider things like seniority in order to keep the process from being arbitrary and solely up to the determinations of the college and university administration, and can minimize disruptions to educational programs.<sup>168</sup> Union membership gives additional force to these contract provisions and makes it harder for administrations to ignore or bypass shared governance or neglect to share information about institutional budgets. Unions may file unfair labor practice complaints if an administration acts arbitrarily and ignores shared governance provisions.<sup>169</sup> Grievances may also be filed, which can be subject to binding arbitration, as was the case at Florida State University.<sup>170</sup>

Language in which faculty rights are more protected include clauses that require advance notice to the faculty some specified time before financial exigency can be declared, clauses that mandate sharing with the faculty financial information that the decision to declare financial exigency is

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164. Dougherty, *supra* note 21, at 51.

165. *Id.* at 52.

166. *Id.* at 53.

167. *Id.*

168. *Id.*

169. *Id.* at 59.

170. Kerr, *supra* note 128.

being based on, and clauses that require the college or university to provide an opportunity for the faculty group, association, or senate to meet in joint consultation well before financial exigency is declared. It is important for the faculty to include notice clauses within their contracts so that the college or university is required to give the faculty notice of plans that may affect the faculty.<sup>171</sup> Such notice plans would be beneficial for faculty in situations like the University System of Georgia, mentioned above, in which the regents were not required to give advance notice to the students and faculty before declaring a merger.<sup>172</sup> By having notice clauses, the contract mandates some level of transparency between the administration and faculty. This gives the faculty advanced warning when tough questions regarding the budget and their employment must be answered. When layoffs are necessary, contracts may also provide rules such as layoff order, definitions of seniority, and recall rights.<sup>173</sup> Such contracts hold the administration accountable in terms of how they are able to lay off tenured faculty, making it less likely that unfair practices are used.

Rights of tenured faculty are least protected when contracts have strong management rights clauses. These clauses will refrain from defining the conditions that must be present for financial exigency to exist or may mandate the processes that determine layoffs.<sup>174</sup> Such provisions make it very difficult to ensure faculty involvement and allow for more arbitrary decisions to be made by the administration. Vague definitions of financial exigency such as “demonstrable enrollment reduction” in which demonstrable is not defined or “modification of curriculum” are examples of contractual language that grant the administration excessive latitude when making decisions that will inevitably affect its faculty.<sup>175</sup> Within the scope of retrenchment, it is important that faculty ensure that their contracts do not include overly broad management rights clauses that afford the administration of the college or university excessive control over the decisions they make without any form of retribution.<sup>176</sup>

Non-tenure track faculty have less protection available than their tenured counterparts. Because of the protections given to tenured faculty, those not

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171. Hendrickson, *supra* note 22.

172. The success of the mergers within the University System of Georgia have been credited to the absence of a show-stopping fuss that many other attempted mergers have faced. The University System of Georgia has used behind-the-scenes meetings prior to announcing the decision to college and university administrators, faculty, and its students. Paul Fain, *Major Mergers in Georgia*, INSIDE HIGHER ED (Jan. 6, 2012), <http://www.insidehighered.com/news/2012/01/06/georgia-university-system-proposes-consolidation-8-campus>.

173. Dougherty, *supra* note 21, at 60.

174. *Id.* at 54.

175. *Id.* at 52.

176. *Id.* at 53.

on track for tenure are usually fired prior to those with tenure. However, within this group of less protected faculty, defensive mechanisms still exist. One method is to have a seniority system in which faculty with greater than a certain number of years cannot be fired before other faculty below that threshold level.<sup>177</sup> Other contracts specify that layoffs must be based on college-wide or university-wide financial exigency, and that the college or university must attempt to locate subsequent employment for the faculty members they lay off.<sup>178</sup>

Whether financial exigency or restructuring is the route that colleges and universities decide to embark on, there are different strategic methods that faculty can try to employ in order to protect their rights. In financial exigency situations, collective bargaining is the most effective method, but the contracts that emerge out of the collective bargaining process must be carefully drafted. In the case of the Florida State University arbitration proceeding, where binding arbitration was mandated within the employment contract for dispute resolutions, faculty members were reinstated because of the arbitrator's decision.<sup>179</sup> While arbitration proceedings do not guarantee or even make it more likely that faculty will succeed in the event of a dispute, the language agreed upon in employment contracts through collective bargaining will inevitably affect the faculty members. Because of this, much attention and thought should be put into the employment contracts. An action brought by multiple faculty members as either a class-action suit or class arbitration not only requires greater attention by the college or university administration, but also carries more weight as the faculty fight on a united front instead of at an individual level, which is easier to ignore.<sup>180</sup> Functioning as part of a larger group will likely lead to better results because of the power that strength in numbers provides.

College and university administrators or members of a board of regents have a more complicated position than the faculty, because unlike the faculty, board members and administrators are not personally driven to fight for their own best interest financially, but should consider all involved and attempt to make the best decision for the college or university and its students. It is important for contracts to be created with the best interests of the college or university and its students in mind, but due care must also be taken when budgetary concerns arise and legal action becomes inevitable, either in the form of faculty-brought lawsuits or student-initiated ones. While student-driven lawsuits have not been successful thus far after a program or degree has been cut, colleges and universities must use good

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177. *Id.* at 60.

178. Dougherty, *supra* note 21, at 60.

179. Kerr, *supra* note 128.

180. *Id.*

faith in making objective decisions based on reliable information. If it does not act in good faith in response to a financial crisis, a college or university could lose in the subsequent litigation over its response to that crisis. This could cost the institution more than it expected to save by eliminating the program or degree. Students are the primary reason, aside from research, that colleges and universities open their doors. So, even discounting the harm that could come of a successful lawsuit, the students' needs should be considered when making choices that will inevitably affect them.

With the overwhelming shift in society towards use of information technology, colleges and universities have followed suit. To some currently unknowable extent, what can be virtually replaced will be.<sup>181</sup> With this being said, it is more important than ever that colleges and universities exhibit financial stability. While online programs are less costly to offer, they also generate less revenue per student enrolled; so colleges and universities cannot merely shift their costs to these new online programs, hoping to have high enrollment trends to counteract the lower tuition rates attached to these programs. Because of this, colleges and universities must exercise even more care when entering into contracts with faculty, and when making spending decisions. As previously discussed, state funding alone is not enough to offset the costs associated with running a college or university, and it is the return on a college's or university's investments that often fund its programs. Because the economy has been improving since the economic downturn that began in 2007, colleges and universities can make smart choices in their investment practices, but that alone will not counteract acting in bad faith when dealing with both faculty and students who challenge retrenchment decisions. As *Beukas* demonstrates, if a college or university does not act in good faith, students may be successful in suing the college or university, and such a defeat in litigation would be sure to harm the financial standing of the college or university.<sup>182</sup> The same can be said of suits brought by faculty members. Some of those suits have already proven successful in an array of cases including *Bloomfield College*.<sup>183</sup> While the Florida State University case

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181. In January 2013 the California State University System piloted online courses for credit, at a low rate of \$150 per course. Three weeks later, The American Council on Education, a group of around 1,800 accredited colleges and universities announced it was also piloting inexpensive online courses at universities including Duke and University of Pennsylvania. The University of Wisconsin is also offering a college degree with no class time required. Thus, colleges and universities have been open to offering online courses, and there is no evidence to suggest this trend will stop. Gregory Ferenstein, *Online Education is Replacing Physical Colleges at a Crazy Fast Pace*, TECHCRUNCH (Feb. 11 2013), <http://techcrunch.com/2013/02/11/a-huge-month-online-education-is-replacing-physical-colleges-at-a-crazy-fast-pace/>.

182. *Beukas v. Bd. of Trs. of Fairleigh Dickinson Univ.*, 605 A.2d 776 (N.J. Super. Ct. Law Div. 1991).

183. *Am. Ass'n of Univ. Professors v. Bloomfield Coll.*, 346 A.2d 615, 617 (N.J.

study was resolved by arbitration, that result was also favorable to the faculty members in question.<sup>184</sup>

To ensure that there are fair dealings within faculty relations, it is important for the college or university to first have a contract that is conducive toward making the hard decisions that the institution will be faced with in the reality of tough financial times. Every contract of this sort imposes upon each party a duty of good faith and fair dealing within both the performance and enforcement of the contract.<sup>185</sup> Good faith performance or enforcement emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.<sup>186</sup> Within good faith, the parties are required to act in accordance with the contract and are forbidden intentionally to try to break a contract provision or purposefully to mislead the other party. While college and university administrations should use good faith in their dealings, they need provisions in their contract with the faculty that gives the administration some latitude in making hard decisions in tough financial times.<sup>187</sup> On the other hand, when notice rights and shared governance are built into the contract, faculty members are able to be involved in the reorganization and layoff process when financial exigency and retrenchment loom.<sup>188</sup> If the contract is too favorable to the administration when it comes to handling exigent circumstances, the faculty may be unable to participate meaningfully in the decision-making process. When a contract with the faculty gives the faculty a meaningful role in the resolution of the hard questions generated by exigent financial circumstances, the resulting decisions are likely to be better overall than would be the ones reached by an administration that was able to ignore the faculty as it made decisions of this sort.

In order to ensure fair dealings with students, colleges and universities should at the very least provide methods by which the student can be made whole and have a new alternative if their department is terminated. While student participation is not necessary as a legal matter when retrenchment decisions are being made, using a more transparent process like the one that the University System of Georgia is employing in the implementation of its mergers is also helpful in ensuring that the students' concerns are met.<sup>189</sup> While the Georgia merger decision was made behind closed doors, which generated community outrage, by allowing faculty, students, alumni and

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Super. Ct. App. Div. 1975).

184. Fla. State Univ. Bd. of Trustees, *supra* note 127.

185. RESTATEMENT (SECOND) OF CONTRACTS §205 (1981).

186. *Id.*

187. Dougherty, *supra* note 21, at 52.

188. *See id.*

189. Rivard, *supra* note 103.

others in the actual merging process, the University is not only generating more support, but is more likely to have a resolution that all parties can be happy with.<sup>190</sup> Instead of each side fighting against the others, they can work together in order to arrive at a mutually beneficial solution. This solution can also be cost-effective, and can therefore allow the college or university to proceed in a manner that is best for the students and faculty alike. An approach of this sort may allow institutions to avoid program closures, as well as disputable layoffs that can be detrimental to both the college or university and its students.

## VI. CONCLUSION

While budget cuts and layoffs are never a desired outcome, the true purpose of higher education must be maintained: to conduct meaningful research while also educating students who wish to better their own understanding and be able to apply this understanding to their everyday lives. The purpose of colleges and universities is not to create jobs for people in the field of higher education, even though this sort of job creation is a positive side effect of the presence of a college or university in a community. This being said, it is indisputable that there are multiple sides within faculty and college and university relations, and faculty relations must be considered in order to uphold the institution's purpose. Not only must the faculty and administration perspectives be taken into consideration, but the effect on the student population must also be considered in decisions to cut departments, to fire faculty and staff, and to merge current colleges and universities. The mission statements and creeds of various institutions considered in my case studies present those institutions as places that strive to employ individuals who "[take] pride in working at a university that is academically strong, diverse in perspective and allows students to combine activities and classes into a unique, personalized college experience."<sup>191</sup> One of those mission statements describes the ideal student as "someone who sees the value of balancing rigorous study and individual development."<sup>192</sup> Other creeds state that "academic institutions exist, among other reasons, to discover, advance and transmit knowledge and to develop in their students, faculty and staff the capacity for creative and critical thought."<sup>193</sup> These creeds, among numerous others, do not vow to keep budgets low and use as many cost-saving techniques as possible. The mission of colleges and universities, as

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190. *Id.*

191. *Wolves Creed*, UNIV. OF WEST GA., [http://uwgsports.com/sports/2011/11/17/GEN\\_1117112622.aspx](http://uwgsports.com/sports/2011/11/17/GEN_1117112622.aspx) (last visited July 30, 2014).

192. *Id.*

193. *VCU Creed: Philosophy for an Academic Community*, VA. COMMONWEALTH UNIV., <http://www.vcu.edu/vcu/creed.php> (last visited July 30, 2014).



told through their creeds and mission statements, focuses on students' needs and on research objectives. Both of those considerations should remain at the forefront when difficult decisions are being made. In deciding the best possible courses of action, the entire spectrum of those affected should be considered. In order to arrive at the best course of action a college or university should take, the perspectives of the faculty, the administration, and the students into account.

The fact that student initiated lawsuits have not been successful is simultaneously encouraging and concerning. It is positive because courts require that colleges and universities exercise good faith during decision-making that may be adverse to students. There have not yet been instances in which a college or university has been proven not to have acted in good faith in its dealings with students. The lack of success of student-initiated lawsuits is somewhat disconcerting in that the lack of success could cause college and university administrators to believe they can get away with some degree of bad faith (e.g., acting arbitrarily or failing to give prompt notice) in their decision-making process. It must also be assessed whether or not the threshold a student plaintiff must surpass to prove bad faith is too demanding, thereby tolerating improper practices in the relationship between college and university administrators and students. If this is the case, then the only remedy for students is to implore their legislators to develop stricter guidelines that public college and university administrators in their state must abide by when deciding which programs, degrees, colleges and universities within their system should be cut and which should continue to receive funds.

Financial instability cannot merely be dismissed and forgotten, but must be dealt with impartially and strategically. Complying with contract clauses from the very inception of employment and using good faith when making tough decisions allows colleges and universities to avoid liability in the event of litigation or arbitration. In any event, no matter what the cure, every side of the argument should be able to have participation on some level. Even the University System of Georgia, which has been criticized for making primary decisions behind closed doors, sought participation from the community, faculty, and students in the actual merger process. Florida State University, because it did not use good faith in its financially driven decisions, had to reinstate their tenured faculty. Virginia's legislature is allowing for more institutional autonomy so long as the decisions are in accordance with the state's demands of those institutions. Thus, within each case study, each side of the argument was taken into consideration. While there is no right or wrong prescription, the heart of the conversation lies with consideration for all sides, and it is important that college and university communities continue to employ devices that do not inhibit involvement. While that involvement can be constructive even when it is available only after the basic decisions have been made, it is

much more likely to produce a satisfying result when it is invited at the outset of the decision-making process.



THE COAL MINER’S DAUGHTER PREFERENCE:  
A REVIEW OF CASHIN’S *PLACE, NOT RACE*:  
A NEW VISION OF OPPORTUNITY IN AMERICA

WILLIAM E. THRO\*

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Well, I was born a coal miner's daughter, in a cabin on a hill in  
Butcher Holler—Loretta Lynn.<sup>1</sup>

INTRODUCTION

A half century after Henry Caudill described the abject poverty of  
Eastern Kentucky as “night comes to the Cumberlands,”<sup>2</sup> the region still

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1. LORETTA LYNN, *Coal Miner’s Daughter*, on COAL MINER’S DAUGHTER (Decca Records 1970). The song is autobiographical and describes Ms. Lynn’s upbringing in Butcher Hollow, an unincorporated mining community in Johnson County, Kentucky. The song title became the title of Ms. Lynn’s autobiography (1976) and a major motion picture (1980). Ms. Lynn received the Presidential Medal of Freedom as well as countless awards for her contributions to music.

2. See HARRY M. CAUDILL, *NIGHT COMES TO THE CUMBERLANDS* (1963).

awaits the dawn.<sup>3</sup> Lyndon Johnson, inspired in part by Caudill's work, launched the War on Poverty in Letcher County, Kentucky,<sup>4</sup> but that war was lost in Appalachia.<sup>5</sup> By any objective measure, the fifty-four Kentucky counties<sup>6</sup> served by the Appalachian Regional Commission lag behind the rest of the Commonwealth and the Nation.<sup>7</sup> Indeed, in terms of per capita income, poverty rate, percentage of adults with a high school diploma, percentage of adults with a college degree, and homes with broadband access, the non-Appalachian counties of Kentucky (population 3.2 million) closely track the national average,<sup>8</sup> but the Appalachian counties (population 1.1 million) resemble another country.<sup>9</sup>

Yet, despite the obvious economic, cultural, and educational disadvantages, America's selective schools give little regard for the people of this beautiful, yet troubled, region. Universities have never insisted that a certain number of seats be set aside for residents of Appalachia<sup>10</sup> or that residents of Appalachia should automatically receive bonus points in the admissions process.<sup>11</sup> Higher Education does not litigate over how many

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3. See JOHN CHEVES, BILL ESTEP & LINDA B. BLACKFORD, *FIFTY YEARS OF NIGHT* (2014) (Kindle Edition) (chronicling the current conditions of Appalachian Kentucky on the fiftieth anniversary of Caudill's work).

4. *Id.* at 74.

5. See Kevin D. Williamson, *Left Behind: An Elegy for Appalachia*, *NAT'L REVIEW*, Dec. 16, 2013 at 26.

6. Those counties are Adair, Bath, Bell, Boyd, Breathitt, Carter, Casey, Clark, Clay, Clinton, Cumberland, Edmonson, Elliott, Estill, Fleming, Floyd, Garrard, Green, Greenup, Harlan, Hart, Jackson, Johnson, Knott, Knox, Laurel, Lawrence, Lee, Leslie, Letcher, Lewis, Lincoln, McCreary, Madison, Magoffin, Martin, Menifee, Metcalfe, Monroe, Montgomery, Morgan, Nicholas, Owsley, Perry, Pike, Powell, Pulaski, Robertson, Rockcastle, Rowan, Russell, Wayne, Whitley, and Wolfe.

7. See CHEVES, ESTEP, & BLACKFORD, *supra* note 3, at 3320 (chart comparing Appalachian Counties, non-Appalachian Counties, and nation as a whole).

8. *Id.* For example, non-Appalachia Kentucky has a per capita income of \$25,130 and the Nation has a per capita income of \$28,051. The poverty rate is 16% for non-Appalachia Kentucky and 14% for the Nation. The percentage of adults without a high school diploma is identical (14%). Non-Appalachia Kentucky is slightly below the United States in terms of adult college graduates (28%-24%) and has an identical broadband rate (98%).

9. *Id.* To illustrate, Appalachia Kentucky has a per capita income of \$ 18,158 and the Nation has a per capita income of \$28,051. The poverty rate is 25% for Appalachia Kentucky and 14% for the Nation. The percentage of adults without a high school diploma is 26%; almost double the national norm of 14%. Appalachia Kentucky is far below the United States in terms of adult college graduates (28%-12%) and substantially trails broadband rate (98%-87%).

10. *Cf.* *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 318-19 (1978) (invalidating university plan to reserve a certain number of spaces in the entering class for racial minorities).

11. *Cf.* *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) ("We find that the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant

poor whites constitutes a critical mass or how many poor whites must be in each classroom to ensure diversity across the institution.<sup>12</sup>

Sheryll Cashin, a professor of law at Georgetown University, wants to change this paradigm. In a provocative new book, *Place, Not Race: A New Vision of Opportunity In America*,<sup>13</sup> she “challenge[s] universities to reform both affirmative action and the entire admissions process.”<sup>14</sup> In her view, preferences should emphasize

...place, rather than race, as the focus of affirmative action for the pragmatic reason that it will foster more social cohesion and a better politics. . . . Those who suffer the deprivations of high-poverty neighborhoods and schools are deserving of special consideration. Those blessed to come of age in poverty-free havens are not.<sup>15</sup>

Fifty years ago, “race and gender were appropriate markers for the type of exclusion practiced by most predominately white universities. Today, place is a more appropriate indicator of who gets excluded from consideration by admissions officers at selective institutions.”<sup>16</sup>

Cashin’s rationale for this paradigm shift is basic “fairness.”<sup>17</sup> Her primary focus is to “help those [minority children] *actually* disadvantaged by [de facto] segregation,”<sup>18</sup> but she recognizes “whites who *do* live in impoverished environs or attend high-poverty schools are no less deserving of special consideration—as is anyone who is actually disadvantaged by economic isolation.”<sup>19</sup> Applicants from “low-opportunity places that rise, despite the undertow, deserve special consideration from selective schools. They have enormous fortitude and focus—skills they had to develop to succeed against ridiculous odds, skills that will help them persevere through college. And it should not matter what color they are or what nation they come from.”<sup>20</sup>

Cashin recognizes that her desire to diminish the emphasis on race while increasing emphasis on poverty is “sacrilegious in the civil rights

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solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program.”).

12. *Cf.* *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2416–17 (2013) (discussing a university’s concern about the number of minorities in particular undergraduate classes).

13. SHERYLL CASHIN, *PLACE NOT RACE: A NEW VISION OF OPPORTUNITY IN AMERICA* (2014).

14. *Id.* at ix.

15. *Id.* at xv.

16. *Id.* at xvi.

17. *Id.* at ix.

18. *Id.* at xv.

19. *Id.* at 79.

20. *Id.* at 56.

community.”<sup>21</sup> Acknowledging “[r]ace still matters in American society, particularly in the criminal justice system[,]”<sup>22</sup> she insists that “race is under-inclusive”<sup>23</sup> and that higher education’s race-based affirmative action efforts are about “what skin color the rich kids have.”<sup>24</sup> “Race-based affirmative action buys some diversity for a relative few, but not serious inclusion.”<sup>25</sup> “[R]ace does not, by definition, capture those who suffer the structural disadvantages of segregated schools and neighborhoods. Race is also over-inclusive in that it can capture people with dark skin who are exceedingly advantaged.”<sup>26</sup> “[D]iversity by phenotype puts no pressure on institutions to dismantle underlying systems of exclusion that propagate inequality.”<sup>27</sup>

This review of Cashin’s new vision of equal opportunity has three parts. Part I details her argument and her supporting evidence in some depth.<sup>28</sup> Part II examines the two constitutional questions resulting from a public institution’s choice to adopt Cashin’s emphasis on place rather than race. Specifically, would college or university administrators violate the Constitution by substituting place for race? If an emphasis on place allows an institution to achieve the educational benefits of diversity, must the institution substitute place for race? Part III explores the public policy consequences of her new paradigm.

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21. *Id.* As Cashin explains:

The rub for proponents of affirmative action is that as long as they hold on to race as the sine qua non of diversity, they stymie possibilities for transformative change. The civil rights community, for example, expends energy on a policy that primarily benefits the most advantaged children of color, while contributing to a divisive politics that makes it difficult to create quality K-12 education for all children. I argue that the next generation of diversity strategies should encourage rather than discourage cross-racial alliances and social mobility. I contend that meaningful diversity can be achieved if institutions rethink exclusionary practices, cultivate strivers from overlooked places, and give special consideration to highly qualified applicants of all races that have had to overcome structural disadvantages like segregation.

*Id.* at xix.

22. *Id.* at xv.

23. *Id.*

24. *Id.* at xv–xvi (quoting Walter Benn Michaels, *Most Black Students at Harvard Are from High-Income Families*, 52 J. BLACKS HIGHER EDUC. 13 (2006)).

25. *Id.* at xx.

26. *Id.* at xvi.

27. *Id.*

28. Cashin’s book is deeply personal. There is extensive discussion of her personal upbringing and her experiences as a mother of two sons in Washington D.C. The book ends with a letter to her sons about the challenges that they will face as men of color in twenty-first century America.

## I. OVERVIEW OF CASHIN'S ARGUMENT FOR HER NEW VISION

In Chapter 1, “White Resentment, Declining Use of Race, and Gridlock,”<sup>29</sup> Cashin argues, “law and politics work against the use of race.”<sup>30</sup> Detailing “the constraints of law,” she argues four Justices (Roberts, Scalia, Thomas, and Alito) have embraced a colorblind Constitution<sup>31</sup> while one Justice (Kennedy) rejects a colorblind Constitution but has never upheld a racial preference.<sup>32</sup> Examining “the constraints of politics,” she notes that racial preferences are unpopular among voters and that politicians can achieve more support by opposing rather than supporting racial preferences.<sup>33</sup> Discussing the “Perception Gap: White Resentment in the Age of Obama,” Cashin recounts how minorities and whites have different views of discrimination in contemporary America,<sup>34</sup> but notes “[d]ata about racial disparities mask the experiences of working-class whites.”<sup>35</sup> Concluding the chapter with “Reforming Affirmative Action to Begin Racial Conciliation,” Cashin advocates ending racial preferences and implementing preferences based on poverty and overcoming structural barriers.<sup>36</sup> “If whites are to engage with diversity rather than resent it, the rules of competition must be perceived as fair to them and everyone else.”<sup>37</sup>

In Chapter 2, “Place Matters,”<sup>38</sup> Cashin demonstrates “place, although highly racialized, now better captures who is disadvantaged than skin

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29. *Id.* at 1–18.

30. *Id.* at 2.

31. *Id.* at 3–4.

32. *Id.* at 4. As Cashin explains, any reliance on Justice Kennedy to support a racial preferences is precarious:

Kennedy dissented in *Grutter*. He has never voted to uphold an affirmative action program. Whether the issue is affirmative action, school integration, employment discrimination or some other context touching upon race, he has sounded a consistent theme. For him consideration of the race of individuals is not only unconstitutional but inherently demeaning. In *Rice v. Cayetano*, a case involving voting rights of non-native Hawaiians for election of public trustees of a fund to assist native Hawaiians, he stated: “One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”

*Id.*

33. *Id.* at 6–9.

34. *Id.* at 9–15.

35. *Id.* at 10.

36. *Id.* at 15–18. As Cashin notes, “[t]he relevant debate is not whether we should have had affirmative action in the first place. That question is moot. Given the inevitable demise of race-based affirmative action, the relevant question is, what is its logical replacement?” *Id.* at 16.

37. *Id.* at 18.

38. *Id.* at 19–40.



color.”<sup>39</sup> “In the geographic sorting that goes on in metropolitan areas, everybody aspires to live in a neighborhood that helps them to get ahead. The children of parents who can’t afford to escape to quality are stuck in segregated, high-poverty schools.”<sup>40</sup> This lack of racial and socio-economic class integration has long-term consequences.<sup>41</sup> “A child surrounded by poverty is not exposed to other kids with big dreams and a realistic understanding of how working hard in school now will translate into concrete success years later.”<sup>42</sup> Residents of “high-opportunity neighborhoods rise easily on the benefits of exceptional schools and social networks . . . . Anyone who has spent time in high-opportunity quarters knows intuitively what this means—the habits you observe, the people and ideas you are exposed to, the books you are motivated to read.”<sup>43</sup> Therefore, “place locks in advantages and disadvantages that are reinforced over time. Geographic separation of the classes puts affluent, high-opportunity communities in direct competition with lower-opportunity places for finite public and private resources.”<sup>44</sup>

In Chapter 3, “Optical Diversity v. Real Inclusion,” Cashin turns to the admission policies of highly selective universities.<sup>45</sup> “People of all colors are disadvantaged by current, exclusionary practices in higher education because of where they live or where they went to school, or because they

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39. *Id.* at 21.

40. *Id.*

41. With respect to racial integration:

[R]esearch shows that children of all races and incomes who attend integrated schools improve their critical thinking skills, are less apt to accept stereotypes as truth, lead more integrated lives as adults, and are more civically engaged. Racial minorities in integrated schools also achieve at higher levels, with no detriment to the learning of white students.

*Id.* (quoting Gary Orfield, John Kucsera & Genevieve Siegel-Hawley, *E PLURIBUS . . . SEPARATION: DEEPENING DOUBLE SEGREGATION FOR MORE STUDENTS* 6–11 (2012).

Concerning socio-economic integration:

This differential experience of place greatly affects opportunity. Only about 30 percent of black and Latino families reside in neighborhoods where less than half of the people are poor. Put differently, less than one-third of black and Latino children get to live in middle-class neighborhoods where middle-class norms predominate. Meanwhile, more than 60 percent of white and Asian families live in environs where most of their neighbors are not poor. As urban sociologist John Logan put it, “It is especially true for African Americans and Hispanics that their neighborhoods are often served by the worst-performing schools, suffer the highest crime rates, and have the least valuable housing stock in the metropolis.

*Id.* at 23 (footnotes omitted).

42. *Id.* at 31.

43. *Id.* at 24.

44. *Id.* at 27.

45. *Id.* at 41–62.

are poor.”<sup>46</sup> Those policies are flawed in three respects.

First, there is a geographic bias.<sup>47</sup> “The debate over affirmative action is about who gets into selective schools, and those segregated into lower-opportunity environs are almost invisible in this argument. Economic elites of all colors enjoy built-in advantages in the withering competition for spaces at choice schools . . .”<sup>48</sup> Yet, there are numerous low-income students of all races who could be competitive for those slots.<sup>49</sup> Unfortunately, highly selective institutions often ignore these low-income students because students take the ACT rather than the SAT<sup>50</sup> or because the students live in the Midwest, South, or Mountain West.<sup>51</sup>

Second, instead of pursuing the poor and disadvantaged students of all races, the highly selective institutions pursue upper middle class and upper class minorities.<sup>52</sup> “Professors, administrators, and many students want to look across a room and see a human rainbow. The son of an African World Bank executive or the daughter of a black president counts the same in terms of optics and is easier to admit than the son or daughter of a black policeman.”<sup>53</sup> Indeed, one “unintended consequence[.]” of highly selective institutions’ emphasis on race is a preference for the children of highly educated African immigrants rather than a poor African-American.<sup>54</sup> “[W]hen an elite school uses race-based affirmative action to create optical blackness but little socioeconomic diversity, it masks the struggles of those

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46. *Id.* at 62.

47. *Id.* at 46–49.

48. *Id.* at 42.

49. As Cashin observes:

In fact, the pool of disadvantaged strivers is much larger than many would imagine. Economists Caroline Hoxby and Christopher Avery have garnered headlines for their research about low-income high achievers. They estimate that the number of low-income high school seniors who break the 90th percentile on the SAT or ACT and have a GPA of A- or better ranges from 25,000 to 35,000 each year. Nearly 6 percent of this cohort is black. Nearly 8 percent is Latino. In other words, each year between 3,300 and 4,600 high-achieving, low-income black and brown youth graduate each year. This number does not include middle- and upper-class black and Latino achievers. About 200 poor Native American youth also meet this standard every year. Over 17,000 poor white achievers and 3,800 poor Asian achievers fill out the cohort.

*Id.* at 45–46 (citing Caroline M. Hoxby and Christopher Avery, *THE MISSING ‘ONE-OFFS’: THE HIDDEN SUPPLY OF HIGH-ACHIEVING, LOW-INCOME STUDENTS* (2012)).

50. *Id.* at 46.

51. *Id.* at 47.

52. *Id.* at 49–56.

53. *Id.* at 50.

54. *Id.* See also *id.* at 51 (“About 30,000 blacks immigrate from the Caribbean annually, and this region contributes the largest share of black immigrants at selective colleges (43 percent), followed by Africa (29 percent) and Latin America (7 percent).” (footnote omitted)).

who are limited by the places they have been relegated to.”<sup>55</sup>

Third, financial aid policies increasingly focus not on need, but on merit—a practice that disadvantages the poor.<sup>56</sup> “Research shows a direct trade-off between awarding merit scholarships and enrolling lower-income students.”<sup>57</sup> Indeed, “working-class whites are as alien as the children of the ghetto on selective college campuses and anti-intellectualism and denigration of ‘liberal elites’ has become a common cultural sensibility among blue-collar whites or those who would lead them.”<sup>58</sup>

In Chapter 4, “Place Not Race, and Other Radical Reforms” Cashin turns prescriptive—what is necessary to achieve a significant number of students from disadvantaged areas.<sup>59</sup> Drawing upon the experience of Amherst College, which is enormously successful at enrolling and graduating students from disadvantaged areas, Cashin identifies six factors: (1) a commitment from all levels of the organization; (2) money; (3) bringing recruited students to the campus at the expense of the institution; (4) partnering with an opportunity program for low income student; (5) a no-loan policy for financial assistance; and (6) lowering academic standards by twenty SAT points.<sup>60</sup> Amherst also insists that low-income applicants have “[s]traight A’s...”<sup>61</sup>

Of course, institutional support (factors 1 and 4) and financial commitment (factors 2,3, and 5) are choices that have no real impact on academic reputation, but lowering test scores (factor 6) potentially has ramifications for academic reputation. Yet, as Cashin notes, “[i]n college admissions, high school grade point average is a better predictor than standardized test scores, not only of freshman grades in college but also of four-year college outcomes.”<sup>62</sup> She insists, “all institutions and all of American society should resist the idea that differences in test scores above

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55. *Id.* at 55.

56. *Id.* at 56–61.

57. *Id.* at 58. As Cashin explains:

One study found that as the share of institutionally funded National Merit Scholars increases in a school’s freshman class, the share of Pell Grant recipients in its student body declines. Another found that the introduction of a merit aid program led to a reduction in both black students and low-income students, particularly at top-tier schools. Hill and Winston examined trends at fourteen very elite schools between 2001 and 2009 and found that most of the growth in financial aid given out by these colleges was allocated to the wealthiest of eligible students.

*Id.* (footnotes omitted).

58. *Id.* at 61.

59. *Id.* at 63–87.

60. *Id.* at 65–67.

61. *Id.* at 69.

62. *Id.* at 73.

a certain threshold suggest something meaningful.”<sup>63</sup>

To be sure, many “[p]roponents of race-based affirmative action argue that without it, the numbers of blacks and Latinos at selective schools will plummet.”<sup>64</sup> Cashin concedes the point, but notes “[t]he picture is better when the lens is widened” to include less selective schools.<sup>65</sup> Moreover, when “a middle-class black applicant is disadvantaged along some dimension other than place,” she advocates, “a holistic approach to admissions would enable consideration of such actual disadvantage.”<sup>66</sup>

In Chapter 5, “Reconciliation,”<sup>67</sup> Cashin argues, “based upon insights from social psychology, for much more care and intention in building alliances that transcend boundaries of racial identity.”<sup>68</sup> She focuses on “two parables” from “red” States.<sup>69</sup> The first is the Texas Top Ten Percent Plan, a bipartisan measure guaranteeing admission to the top students at each high school, regardless of the quality of the school or the strength of the individuals test score.<sup>70</sup> This legislation, which passed after the U.S. Court of Appeals for the Fifth Circuit prohibited the consideration of race in college and university admissions,<sup>71</sup> “increased minority enrollments and that of rural white students at the flagship public universities in the state.”<sup>72</sup> “The Ten Percent Plan ameliorates the effects of separate and unequal K-12 education by admitting high achievers from all places from which they apply. The law ended the dominance of a small number of wealthy high schools in UT admissions.”<sup>73</sup> The second parable is Mississippi’s rejection of anti-immigrant legislation.<sup>74</sup> A multi-racial coalition of African-

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63. *Id.* at 74. Cashin elaborates:

Hopefully, we will soon reach a tipping point where institutions and the people who love them throw off the oppressions of rankings and throw a hammer to the whole admissions process and start breaking things—as did Bard College when it offered applicants the option of submitting four 2,500-word essays and no grades or test scores.

*Id.* at 76.

64. *Id.* at 77.

65. *Id.* “A recent study of the impact of affirmative action bans in four states (California, Washington, Texas, and Florida) found that total enrollment of unrepresented minorities did not change at four-year universities. The decline occurred at selective schools, with black and Latino enrollment falling 4.3 percent overall at those schools.” *Id.* (footnote omitted)

66. *Id.* at 79.

67. *Id.* at 89–108.

68. *Id.* at 98.

69. *Id.* at 89.

70. *Id.* at 89–92.

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

72. CASHIN, *supra* note 13, at 90 (citing Nicholas WEBSTER, ANALYSIS OF THE TEXAS TEN PERCENT PLAN (2007)).

73. *Id.*

74. *Id.* at 92–95.

Americans, immigrants, and unions successfully lobbied against the legislation. Cashin ends the chapter with a brief discussion of how “[w]ith effort, strange bedfellows can unite against unfair structural barriers even if those systems distribute burdens unevenly.”<sup>75</sup> As she observes, “[w]hite rural, white struggling suburban, black inner city, black middle class, Latino barrio, Latino middle class, Native reservation, urban Indian, poor Asian—all of these people are hurt by geographic concentrations of wealth and resources to different degrees and in different ways.”<sup>76</sup>

Overall, Cashin’s book is provocative and well researched, but it does have some flaws. Although the book is relatively short (132 pages of text including the introduction), it is often repetitive and, at times, tedious. The introduction, Chapters 2–3, a shorter version of Chapter 4, and the conclusion would make an excellent law review article, which might be more influential than a stand-alone book. One gets the impression that Chapter 5 and the Epilogue “Letter to My Sons”<sup>77</sup> were “make weight” mechanisms for the publisher as these pages add little or nothing to the overall argument. Nevertheless, Cashin’s vision of new opportunity raises significant constitutional questions and important public policy implications. The next Parts of this Review explore the constitutional questions and the public policy implications.

## II. CONSTITUTIONAL QUESTIONS RAISED BY CASHIN’S VISION

For institutions of higher education that choose to pursue affirmative action in admissions, Cashin’s vision raises two significant constitutional questions.<sup>78</sup> First and most obviously, would college and university administrators violate the Constitution by substituting place for race?

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75. *Id.* at 104.

76. *Id.*

77. *Id.* at 113–20.

78. Although private institutions are not subject to the restrictions of the Constitution, see *In re Civil Rights Cases*, 109 U.S. 3 (1883), private institutions that receive federal funds must adhere to constitutional standards. To explain, all private institutions that receive federal funds are subject to Title VI, 42 U.S.C. § 2000d, which prohibits racial discrimination. The Supreme Court explicitly held that “that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by a [private] institution that accepts federal funds also constitutes a violation of Title VI.” *Gratz v. Bollinger*, 539 U.S. 244, 275 n.23 (2003). See also *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (suggesting that because there is no equal protection violation, there is no Title VI violation). Moreover, the non-discrimination obligation of Title VI applies to “all of the operations” of “a college, university, or other postsecondary institution, or a public system of higher education . . . any part of which is extended Federal financial assistance.” 20 U.S.C. § 2000d-4a. An institution subject to Title VI may not discriminate because of race or gender in financial aid programs “directly or through contractual or other arrangements” 34 C.F.R. §100.3(b).

Second and more profoundly, if an emphasis on place allows an institution to achieve the educational benefits of diversity, must the institution substitute place for race?

#### A. Substituting Place for Race Is Constitutional

In Cashin's vision, students would receive a preference in the admissions process because of place, not race. What matters is whether the student is from an area of high poverty where there are structural barriers to equality and social mobility.

The constitutional analysis of Cashin's paradigm begins with the propositions that the Equal Protection Clause<sup>79</sup> is "essentially a direction that all persons similarly situated . . . be treated alike,"<sup>80</sup> and that the Constitution protects "*persons, not groups*."<sup>81</sup> Indeed, the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."<sup>82</sup> If a statute or regulation treats everyone equally, there is no equal protection violation.<sup>83</sup>

Yet, the Equal Protection Clause does not prohibit all governmental classifications.<sup>84</sup> "Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law. When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern."<sup>85</sup> The "general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."<sup>86</sup> This general rule gives way in those rare instances when statutes infringe upon fundamental constitutional rights or utilize "suspect" or "quasi-suspect" classifications.<sup>87</sup>

In giving a preference to those who live in poverty and encounter structural barriers to educational and socio-economic success, Cashin's vision does not tread upon fundamental rights or utilize a classification—such as race or sex—warranting heightened scrutiny. Classifications based

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79. U.S. CONST. amend. XIV, § 1

80. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985).

81. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (emphasis in original). See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279–80 (1986).

82. *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

83. *Romer v. Evans*, 517 U.S. 620, 623 (1996).

84. *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976).

85. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271–72 (1979).

86. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985); *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981).

87. *Cleburne*, 473 U.S. at 440–41; *Graham v. Richardson*, 403 U.S. 365 (1971); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969).

on an individual's wealth or the characteristics of the surrounding community are subject to rational basis review.<sup>88</sup> Because Cashin's place preference is rationally related to the legitimate state interest in helping those who are disadvantaged, it is constitutional.

To be sure, Cashin's emphasis on place will disproportionately help persons of color, but it will also assist a substantial number of poor whites. "The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility. In assessing an equal protection challenge, a court is called upon only to measure the basic validity of the legislative classification."<sup>89</sup> Absent an explicit racial classification, Cashin's paradigm is constitutionally benign.

#### B. If an Emphasis on Place Achieves the Educational Benefits of Diversity, then the Constitution Prohibits the Use of Race

If an emphasis on place is constitutionally benign, then an emphasis on race is constitutionally radioactive. "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."<sup>90</sup> Indeed, because racial distinctions "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality"<sup>91</sup> and are "contrary to our traditions and hence constitutionally suspect,"<sup>92</sup> "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."<sup>93</sup> Consequently, the Constitution imposes special rules for any racial classification.<sup>94</sup>

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88. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24–25 (1973).

89. *Feeney*, 442 U.S. at 272.

90. *Rice v. Cayetano*, 528 U.S. 495, 517 (2000).

91. *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

92. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

93. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). *See also* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) ("Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.") and *Loving v. Virginia*, 388 U.S. 1, 11 (1967) ("the Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny.'").

94. Recognizing that "racial characteristics so seldom provide a relevant basis for disparate treatment," *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989), racial classifications "are constitutional only if they are narrowly tailored to further compelling governmental interests." *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (citations omitted). *See also* *Croson*, 488 U.S. at 493 (O'Connor, J., joined by Rehnquist, C.J., White and Kennedy, JJ., announcing the judgment of the Court). "Absent searching judicial inquiry into the justification for such race-based measures, we have no way to determine what 'classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or

First, the presumptions of constitutionality and burden of proof are flipped. Instead of presuming that governmental action is constitutional<sup>95</sup> and requiring the challenger to demonstrate otherwise,<sup>96</sup> “the government has the burden of proving that racial classifications ‘are narrowly tailored measures that further compelling governmental interests.’”<sup>97</sup> In the context of racial preferences in higher education, “[s]trict scrutiny requires the university to demonstrate with clarity that it’s ‘purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary ... to the accomplishment of its purpose.’”<sup>98</sup> “It remains at all times the University’s obligation to demonstrate, and the Judiciary’s obligation to determine, that admissions processes ‘ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application.’”<sup>99</sup> Furthermore, “the mere recitation of a ‘benign’ or legitimate purpose for a racial classification is entitled to little or no weight.’ Strict scrutiny does not permit a court to accept a school’s assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice.”<sup>100</sup>

Second, government’s use of race is limited to extraordinary circumstances—remedying the present day effects of identified past intentional discrimination by a particular governmental unit or obtaining the educational benefits of a diverse student body in higher education.<sup>101</sup> Just as significantly, the Court has rejected, as a matter of constitutional law, a number of other justifications offered by state and local governments for race-conscious measures: remedying societal discrimination;

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simple racial politics.” *Grutter*, 539 U.S. at 326.

Moreover, the desire of the government to *help* racial minorities does not change the analysis. *See* *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (“[T]he analysis and level of scrutiny applied to determine the validity of [a racial] classification do not vary simply because the objective appears acceptable . . . . While the validity and importance of the objective may affect the outcome of the analysis, the analysis itself does not change.”). Indeed, the Court has “insisted on strict scrutiny in every context, even for so-called ‘benign’ racial classifications, such as race-conscious university admissions policies, race-based preferences in government contracts, and race-based districting intended to improve minority representation.” *Johnson v. California*, 543 U.S. 499, 505 (2005).

95. *Lyng v. Automobile Workers*, 485 U.S. 360, 370 (1988).

96. *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 314–15 (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

97. *Johnson*, 543 U.S. at 505 (quoting *Adarand*, 515 U.S. at 227).

98. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2418 (2013) (quoting *Bakke*, 438 U.S. at 305).

99. *Id.* at 2420 (quoting *Grutter*, 539 U.S. at 337).

100. *Id.* at 2421 (quoting *Croson Co.*, 488 U.S. at 500).

101. *See, e.g., Grutter*, 539 U.S. at 328–30; *Croson Co.*, 488 U.S. at 504–05.



maintaining racial balance; and providing faculty role models for students.<sup>102</sup> The Court also disapproved the rationale of increasing the number of physicians practicing in under-served areas where the institution did not prove that race-conscious admissions would “promote better health-care delivery to deprived citizens.”<sup>103</sup>

Third, consideration of race must be a last resort.<sup>104</sup> In the context of higher education, the college or university must prove there are “no workable race-neutral alternatives [that] would produce the educational benefits of diversity.”<sup>105</sup> If there is a workable race neutral alternative, “then the university may not consider race.”<sup>106</sup>

Cashin’s new vision is particularly relevant to the requirement that race be used only as a last resort.<sup>107</sup> Because minorities will disproportionately benefit from any emphasis on place, Cashin’s paradigm may well result in many institutions achieving the critical mass of minorities necessary to

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102. See *Grutter*, 539 U.S. at 323–24; *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (plurality opinion); *Bakke*, 438 U.S. at 307–10.

103. *Bakke*, 438 U.S. at 310–11. See also *Grutter*, 539 U.S. at 324.

104. Courts must inquire “into whether a university could achieve sufficient diversity without using racial classifications.” *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2420 (2013). As Heriot explained:

“The bottom line, however, is that if capturing the educational benefits of diversity is the goal, the academic judgments that must be made in fashioning an actual policy are numerous and never-ending. Those judgments cannot be simple-minded sentimental ones and they definitely cannot be political in nature. Reason and principle must prevail.

If *Fisher* does nothing else, it should force colleges and universities to confront the research on mismatch in a detached and scientific manner. That means using ideologically diverse teams of qualified, independent investigators— persons whose job and prestige are not dependent on maintaining the status quo. It means adequately funding and supporting the investigation with access to data. It means following standard scientific procedures by making the data available to qualified researchers who wish to critique the work.”

Gail Heriot, *Fisher v. University of Texas: The Court (Belatedly) Attempts To Invoke Reason and Principle*, 2012-13 CATO S. CT. REV 1585, 2003–10 (2013) (footnotes omitted).

105. *Fisher*, 133 S.Ct. at 2420.

106. *Id.*

107. As Cashin observes:

When an affirmative action plan is challenged in court, the court must be satisfied that there are “no workable race-neutral alternatives” to achieve the educational benefits of diversity. In theory, a race-based affirmative action plan can survive strict scrutiny. But the Court imposed an exacting standard for narrow tailoring that will be difficult to meet. With each passing year, as demographic change and experimentation enhance possibilities for achieving diversity without using race, the challenge of surviving lawsuits filed by disgruntled applicants will grow more onerous.

Cashin, *supra* note 13, at 5.

obtain the educational benefits of diversity. If so, then the institution *must* cease using race and start using the race neutral alternative of place.<sup>108</sup> In other words, an emphasis on place may well lead to an end of the emphasis on race.<sup>109</sup>

### III. PUBLIC POLICY IMPLICATIONS

In addition to the constitutional questions discussed above, Cashin's vision has significant public policy implications. First, if implemented, it would signal an end to institution's pursuit of "optical diversity." Second and perhaps most importantly for the political acceptance of Cashin's proposal, it will benefit poor whites.

#### A. End to Optical Diversity

As Cashin explains in detail in Chapter 3, institutions are focused on "optical diversity."<sup>110</sup> As long as the class picture contains a significant number of people of color, the college or university can trumpet the triumph of its diversity policy. It does not matter that these students of color come from upper class families or attended elite private schools. It does not matter that their parents are highly educated recent immigrants from Africa, the Caribbean, or South America. The only thing that matters is that their skin tone creates an image of a diverse class. Conversely, a student who grew up in poverty, the student who attended the failing public school, or the child of the high school drop-out who never knew her father, may not change the optics.

This pursuit of optical diversity contradicts the Supreme Court. There is no compelling "interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated

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108. Although college and university administrators may well be alarmed at the end of racial preferences, such a development need not lead to a dramatic decline in minority representation. Indeed, after California banned racial preferences through a state constitutional amendment, the University of California had an increase in both the number of minority applicants and number of minorities actually attending. Richard Sander & Stuart Taylor, Jr., *MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT* 2504 (2012) (Kindle Edition).

109. Conversely, there will be some institutions where there are no workable race neutral preferences. This likely will be the case if the minority population is relatively low, if the high schools where minorities attend generally are integrated, and if whites are a significant portion of the poor and/or the first generation applicants. Those universities will be allowed to pursue racial preferences, albeit subject to the significant limitations imposed by the court.

110. Cashin, *supra* note 13, at 41–62.

aggregation of students.”<sup>111</sup> Rather, the diversity that qualifies as a compelling governmental interest “encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”<sup>112</sup> “A university is not permitted to define diversity as ‘some specified percentage of a particular group merely because of its race or ethnic origin.’”<sup>113</sup> “That would amount to outright racial balancing, which is patently unconstitutional.”<sup>114</sup> “Racial balancing is not transformed from ‘patently unconstitutional’ to a compelling state interest simply by relabeling it ‘racial diversity.’”<sup>115</sup>

In Cashin’s vision, the focus shifts from a superficial optical diversity to real inclusion. A student of color who has the advantages of class, schooling, or educated parents will not receive a preference. Instead, the preferences will go to students of all races who face and overcome obstacles. As she explains:

Place disadvantages poor whites differently than it does low-income students of color, who are more likely to grow up in high-poverty neighborhoods. It would be counterproductive to engage in an “Oppression Olympics,” comparing the obstacles of growing up poor, rural, and white to the challenges of overcoming concentrated poverty. The truth is that low-income students of all colors— even high-achieving ones, even valedictorians— are being overlooked by selective campuses. . . .<sup>116</sup>

Instead of a campus that “looks like America,” Cashin seeks a campus that embodies the American dream of upward mobility through hard work and achievement.

If Cashin’s plan is adopted, optical diversity will disappear and the emphasis will be on socio-economic diversity and rewarding those who have overcome structural obstacles. Ironically, this approach, which will encompass applicants from a variety of backgrounds and experiences, is far closer to the Supreme Court’s definition of diversity than the present analysis.

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111. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978) (Powell, J., announcing the judgment of the court).

112. *Id.*

113. *Fisher v. Univ. of Tex.*, 131 S. Ct. 2411, 2419 (2013) (opinion of Powell, J., announcing the judgment of the Court) (quoting *Bakke*, 438 U.S. at 307).

114. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

115. *Parents Involved in Comm. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 732 (2007).

116. Cashin, *supra* note 13, at 49.

### B. Substantial Benefit to Poor Whites

In contemporary America, “not all white and Asian children are privileged, and not all black and Latino children are poor.”<sup>117</sup> Income inequality is growing;<sup>118</sup> the white underclass<sup>119</sup> is increasingly dysfunctional and self-destructive.<sup>120</sup> “Racial disparities in the poverty rate have narrowed significantly since 1970, and economic insecurity now threatens to engulf more than three-quarters of white adults by the time they turn sixty.”<sup>121</sup>

Yet, the primary beneficiaries of admissions preferences are middle class minorities.<sup>122</sup> “Race can make institutions complacent and unwilling to

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117. *Id.* at xix.

118. As Sander and Taylor note:

Since 1979 the share of consumer income in the United States going to the top 5 percent of the income distribution has doubled, and the share going to the top 0.1 percent has more than tripled. Measures of social mobility show that persons who start life in the bottom fifth of the income distribution are less likely now than they were a generation ago to move to the top half.

Sander & Taylor, *supra* note 108, at 4448–4514.

119. As Cashin explains:

Data about racial disparities mask the experiences of working-class whites. Median wealth of whites is twenty times that of blacks and eighteen times that of Latinos, a gap that doubled as a result of the collapse of the housing market. But working-class whites fall far below any median of white wealth. For many, the very idea of “wealth” being associated with their circumstances is laughable. The most recently reported median annual income for whites over age twenty-five without a college degree is \$ 28,644, compared to \$ 23,582 for blacks and \$ 22,734 for Latinos who also only completed high school. This reflects a greater than 20 percent income disparity, but the white person trying to live on such wages is much closer in in circumstances to working-class blacks and Latinos than they are to whites higher up the income scale. When civil rights advocates discuss racial inequality or when progressive academics speak of “white privilege,” what they are really comparing is the experiences of ordinary people of color to that of affluent whites. Working-class whites are rarely disaggregated in these debates. They don’t feel privileged, and they are not privileged in the globalized economy.

Cashin, *supra* note 13, at 10 (footnotes omitted).

120. See CHARLES MURRAY, *COMING APART: THE STATE OF WHITE AMERICA 1960-2010* (2012).

121. Cashin, *supra* note 13, at 11 (footnotes omitted).

122. While racial preferences increase the number of minorities on campus, they do little to increase the number of poor minorities on campus. As Sander & Taylor explain:

In an authoritative series of national surveys of high school students, more than half of blacks entering elite colleges in 1972 came from families that were in the bottom half of the socioeconomic distribution. By 1982 less than a quarter of blacks entering elite colleges came from the bottom half, and by 1992 the proportion was down to 8 percent. Two-thirds of the 1992 cohort of blacks at elite colleges came from the top quartile of the American socioeconomic distribution—that is, the upper-middle class and

rethink exclusionary practices that are not relevant to mission.”<sup>123</sup> “Rather than being ‘visibly open to talented and qualified individuals of every race and ethnicity,’ selective colleges can much more accurately be described as bastions of privilege, with no more than a tenth of their enrollments coming from the less fortunate half of American society.”<sup>124</sup>

Cashin’s paradigm opens the selective institutions to those of all races who have risen above abject poverty and humble circumstances. The focus is on the poor who have achieved, not the minority who can change the cosmetic appearance of the classroom. Because minorities are disproportionately poor and confined to failing schools, minorities will certainly benefit; but the poor white will no longer be out of sight. Rather, poor whites will receive substantial benefit.

### CONCLUSION

Long before a daughter of Kentucky sang of “a cabin on a hill in Butcher Holler,”<sup>125</sup> a son of Kentucky described our Nation as “conceived in liberty and dedicated to the proposition that all . . . are created equal.”<sup>126</sup> Because we are human, America—through our individual and collective acts and omissions—has fallen short of these self-evident truths.<sup>127</sup> Racial minorities—particularly African-Americans—have disproportionately borne the consequences of those sins.

Given our trespasses, there is a strong moral argument in favor of racial preferences,<sup>128</sup> but such a paradigm is constitutionally impossible.<sup>129</sup> By

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the upper class. There is little reason to think that things have gotten better since then.

Sander & Taylor, *supra* note 108, at 4442–47.

123. Cashin, *supra* note 13, at 78.

124. PETER SCHMIDT, *COLOR AND MONEY: HOW RICH WHITE KIDS ARE WINNING THE WAR OVER COLLEGE AFFIRMATIVE ACTION 3* (2007).

125. Lynn, *supra* note 1.

126. Abraham Lincoln, *GETTYSBURG ADDRESS* (1863), *available at* <http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm>. Although Lincoln generally is associated with Illinois, he was born in a cabin in Sinking Spring, Kentucky, an unincorporated area of Hardin (now Larue) County. Lincoln spent the first seven years of his life in Kentucky.

127. *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776).

128. *See* RANDALL KENNEDY, *FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, & THE LAW* (2013) (making a moral argument in favor of racial preferences based on societal discrimination). *But cf.* Russell K. Nieli, *WOUNDS THAT WILL NOT HEAL: AFFIRMATIVE ACTION AND OUR CONTINUING RACIAL DIVIDE* (2012) (making a social science argument against racial preferences). For contrasting reviews of both works in these pages, see William E. Thro, *The Future of Racial Preferences: A Review of Russell K. Nieli’s Wounds That Will Not Heal: Affirmative Action and Our Continuing Racial Divide & Randall Kennedy’s for Discrimination: Race, Affirmative Action, and the Law*, 40 J.C. & U.L. 359 (2014), and Michael K. Olivas, *The Burden of Persuasion: Affirmative Action, Legacies, and Reconstructing History: A Review of Russell K.*

recognizing “[p]eople of all colors are disadvantaged by current, exclusionary practices in higher education because of where they live or where they went to school, or because they are poor,”<sup>130</sup> Cashin shifts the paradigm from race<sup>131</sup> to place. More importantly, Cashin’s vision is constitutionally plausible, and, in some instances, constitutionally mandated. “Given the strong public opposition to use of race in college admissions and the risk of legal challenges under the tightened *Fisher* standard, it would make sense to tailor affirmative action to those who are actually disadvantaged by structural barriers, rather than continue with a race-based affirmative action that [benefits] high-income, advantaged blacks . . . .”<sup>132</sup> In other words, establish preferences for a coal miner’s daughter.

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*Nieli’s Wounds That Will Not Heal: Affirmative Action and Our Continuing Racial Divide & Randall Kennedy’s for Discrimination: Race, Affirmative Action, & The Law*, 40 J.C. & U.L. 381 (2014).

129. Remediating societal discrimination is not and never has been a compelling governmental interest. *Grutter v. Bollinger*, 539 U.S. 306, 323–24 (2003); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 306–10 (1978). As the Court explained:

“societal discrimination” does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved.

*Bakke*, 438 U.S. at 310. Similarly, the Court has rejected the notion of increasing the representation of minorities is a compelling governmental interest. *Grutter*, 539 U.S. at 323–24; *Bakke*, 438 U.S. at 306–10. “Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.” *Bakke*, 438 U.S. at 307.

130. Cashin, *supra* note 13, at 61.

131. “Race can make institutions complacent and unwilling to rethink exclusionary practices that are not relevant to mission.” *Id.* at 78.

132. *Id.*



# JUSTICE ACCOSTED: A REVIEW OF BRUCE ALLEN MURPHY'S *SCALIA: A COURT OF ONE*

GREGORY BASSHAM\*

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America's increasingly polarized political culture takes a toll on many things. Bruce Allen Murphy's *Scalia: A Court of One*<sup>1</sup> offers a small but telling illustration.

Murphy's thesis is simply stated: Scalia—the arch-conservative Supreme Court Justice liberals love to hate—is a bully, an attention-hound, and a hypocritical fraud who (thank goodness!) has not been particularly effective on the Court because of his uncompromising ideological rigidity and his intemperate personal attacks on his fellow Justices.

What I find most instructive is not that such an overtly negative, Rita-Skeeter-ish-type<sup>2</sup> biography should be written, but how favorably it has been reviewed.

Thus, Kevin J. Hamilton praises the book in a review for the *Seattle Times* as “a terrific start to understanding Justice Scalia and his impact on American constitutional law.”<sup>3</sup> Paul M. Barrett, writing in the *San Francisco Chronicle*, lauds Murphy's “fair-minded biography.”<sup>4</sup> Glenn C. Altshuler gushes in the *Boston Globe* that the book “delivers a withering as-

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1. BRUCE ALLEN MURPHY, *SCALIA: A COURT OF ONE* (2014) [hereinafter Murphy].

2. An allusion, of course, to the scandal-loving, fact-twisting, poison-pen author of *The Life and Lies of Albus Dumbledore* in the *Harry Potter* tales of J. K. Rowling. For more on this “enchantingly nasty” character, see J. K. Rowling, *HARRY POTTER AND THE GOBLET OF FIRE* 303–07 (2000) and J. K. ROWLING, *HARRY POTTER AND THE DEATHLY HALLOWS* 22–28 (2007).

3. Kevin J. Hamilton, “*A Court of One*”: *Justice Scalia, Sociable Friend, Formidable Foe*, *SEATTLE TIMES*, Aug. 11, 2014, (book review), [http://seattletimes.com/html/books/2024291574\\_scaliacourttonexml.html](http://seattletimes.com/html/books/2024291574_scaliacourttonexml.html).

4. Paul M. Barrett, *Scalia: A Court of One*, *SAN FRANCISCO CHRONICLE*, June 13, 2014, (book review), <http://www.sfgate.com/books/article/Scalia-A-Court-of-One-by-Bruce-Allen-Murphy-5551650.php>.



sault on its subject.”<sup>5</sup> Dwight Garner, reviewing the book for the *New York Times*, writes that the “book does not read, despite its blunt criticisms, like a book-length put-down,” but rather as “a sensitive and scholarly reading of Justice Scalia’s intellectual life.”<sup>6</sup> An anonymous reviewer for *Kirkus Reviews* describes Murphy’s work as a “deeply probing biography” that offers “a thorough, evenhanded study” of its subject.<sup>7</sup> Dahlia Lithwick, writing in *The Atlantic*, happily opines that in Murphy, Scalia “has met a timely and unintimidated biographer ready to probe,” who “painstakingly reviews the evidence” for Scalia’s patently false claim that “no [judicial] act of his is ever grounded in his personal faith.”<sup>8</sup> And Andrew Cohen, in a review for *The Week*, gives the book a big thumbs-up for showing what a “striving, conniving political animal” Scalia really is, and confidently predicts that “100 years from now it surely will animate the discussion of Scalia’s place in constitutional history.”<sup>9</sup>

Such reviews tell us more about the uncivil, deeply divided political climate in which we live than they do about the merits of Murphy’s book.

#### I. NINO V. THE NINOPATH

There are currently two biographies of Justice Scalia, each with distinctive strengths and weaknesses. The first was Joan Biskupic’s *American Original: The Life and Constitution of Supreme Court Justice Antonin Scalia*.<sup>10</sup> Biskupic’s book is well-written, balanced, and based on extensive personal interviews with Justice Scalia himself, his family, and colleagues. While critical of Scalia’s positions on issues such as freedom of the press, women’s equality, and *Bush v. Gore*, it offers a generally appreciative portrait of Scalia the man. Biskupic’s book is less helpful, however, on Scalia’s early life, his judicial philosophy, and his intellectual contribution.

Murphy’s biography is longer, more in-depth, and more extensively re-

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5. Glenn C. Altschuler, “*Scalia: A Court of One*” by Bruce Allen Murphy, *BOSTON GLOBE*, June 10, 2014, (book review), <http://www.bostonglobe.com/arts/books/2014/06/09/book-review-scalia-court-one-bruce-allen-murphy/I6XBTBaCTwoEvIhuFYdrYK/story.html>.

6. Dwight Garner, *A Justice Alone, Even if Surrounded*, *NEW YORK TIMES*, June 10, 2014, (book review), <http://www.nytimes.com/2014/06/11/books/scalia-a-court-of-one-by-bruce-allen-murphy.html>.

7. *Scalia: A Court of One*, *KIRKUS REVIEWS*, April 10, 2014, (book review), <https://www.kirkusreviews.com/book-reviews/bruce-allen-murphy/scalia/>.

8. Dahlia Lithwick, *Scalia v. Scalia: Does His Faith Influence His Judicial Decision Making?*, *THE ATLANTIC*, (May 21, 2014) (book review), <http://www.theatlantic.com/magazine/archive/2014/06/scalia-v-scalia/361621/>.

9. Andrew Cohen, *Justice Scalia: Sometimes Right, Often Wrong, Never in Doubt*, *THE WEEK*, May 28, 2014, (book review), <http://theweek.com/article/index/262178/justice-scalia-sometimes-right-often-wrong-never-in-doubt#axzz34fnJU2vP>.

10. JOAN BISKUPIC, *AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA* (2009).

searched than Biskupic's, but is less readable and makes no pretense to even-handedness. Murphy, a political science professor at Lafayette College, specializes in thick, tell-all lives of Supreme Court Justices. His earlier biographies of Abe Fortas and William O. Douglas, though valuable and deeply-researched, were sensationalistic and drew speculative, unflattering conclusions that were not always well-supported by the evidence. This book is written in a similar vein.

Unlike Biskupic, Murphy apparently conducted few interviews in researching his subject. Instead, he draws heavily on public sources and archival records, and focuses primarily on Scalia's constitutional decision making during his 28-year tenure on the Supreme Court. The result is a scholarly but sometimes plodding intellectual biography, punctuated at frequent intervals by zestful attacks on Scalia's character and—as Murphy sees it—the nonsensical “original meaning” approach to interpreting the Constitution to which Scalia pays lip-service.

The story Murphy tells is really a tale of two Scalias. As evidenced by his biographies of Fortas and Douglas, Murphy is a firm believer in the power-corrupts school of historiography. What we get, accordingly, is a rise-and-fall story about a pre-power Scalia and a post-power Scalia.

The first tale is a Horatio-Alger story about a boy who made good. Born in Trenton, New Jersey in 1936, and reared for much of his childhood in Queens, “Nino” Scalia was the only child in a pious and intellectual household of big dreams but modest means. His father, Salvatore, immigrated from Sicily as a teenager. Speaking little English when he arrived, Salvatore received a Ph.D. from Columbia University when he was nearly 50 and became a professor of Romance Languages at Brooklyn College. Hard-working and intellectually gifted, Nino finished first in his class in high school and Georgetown, graduated Summa Cum Laude from Harvard Law School, rose quickly in his early career as a corporate lawyer in Cleveland, legal academic at top law schools, and government official in the Nixon and Ford administrations. Along the way, Scalia married his law-school sweetheart, raised a model family of nine children, stayed true to his faith and his principles, was funny, gregarious, and well-liked, and seemed to do everything right. Although Murphy certainly sees seeds of Scalia's later besetting sins in his early career—notably ambition, combativeness, ideological rigidity, and an over-fondness for rules and authority—the general picture is positive and admiring.

As Murphy tells it, a far less attractive Scalia begins to emerge when President Reagan appointed him in 1982 to the U.S. Court of Appeals in Washington, D.C. As a law professor at the University of Chicago, Scalia had teamed with his conservative colleague Frank Easterbrook to revive a “textualist” approach to reading statutes and other legal texts. Roughly, such an approach looks to the original public or conventional meaning of legal texts, rather than to the subjective intentions or purposes of their au-

thors.<sup>11</sup> Scalia's commitment to both textualism and judicial restraint immediately put him at odds on the D.C. court with liberal colleagues such as David Bazelon, J. Skelly Wright, and Patricia Wald. Left-leaning law clerks at the court began to refer to Scalia as "the Ninopath" for "his almost pathological unwillingness to bend."<sup>12</sup> But it wasn't until President Reagan appointed Scalia to the U. S. Supreme Court in 1986 that things really begin to go downhill in Murphy's morality tale.

Once on the Court, Scalia becomes nastier and more combative. Increasingly, he issues "Ninograms" and flies into "Ninofits."<sup>13</sup> Violating "prevailing ethical norms of the Court"<sup>14</sup> against extrajudicial speechmaking, Scalia begins to give provocative speeches "outlining the terms of how he would act in the future,"<sup>15</sup> thereby beginning "the process of politicizing the Court and launching the partisan warfare among the judges."<sup>16</sup> As his arrogance grows, he refuses to recuse himself from cases in which his impartiality is clearly in question,<sup>17</sup> flips rude hand gestures at reporters,<sup>18</sup> and engages in other conduct that make him "the poster child for misbehavior and controversy"<sup>19</sup> on the Court. As time goes on, he increasingly allows his conservative religious beliefs to influence his judicial decisions.<sup>20</sup> His grandstanding, acerbic temper, and rigid refusal to compromise make it impossible for him to build effective coalitions with conservative colleagues such as Sandra Day O'Connor and Anthony Kennedy, who, in fact, are driven to the center by his sharply-worded attacks. Though he professes to practice judicial restraint and fidelity to the Constitution's original meaning, his decisions on the Court become more and more obviously political and result-driven.<sup>21</sup> Finally, the ultimate low point: *Bush v. Gore*.<sup>22</sup> Consumed by a desire to become Chief Justice and appalled at the prospect of a Gore presidency with all that would mean for the future of the country and the Court, Scalia betrays all of his professed judicial principles and hands the presidency to Bush in a brazen act of politics that was nothing

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11. See Gregory Bassham, *Textualism's Last Stand: A Review of Scalia and Garner's Reading Law*, 39 J. C. & U. L. 211, 212–13 (2013). I will have more to say about Scalia's brand of textualism below.

12. Murphy, *supra* note 1, at 104.

13. *Id.* at 178.

14. *Id.* at 171.

15. *Id.* at 172.

16. *Id.*

17. *Id.* at 298–307.

18. Bassham, *supra* note 11, at 348–50.

19. *Id.* at 350.

20. *Id.* at 362–67.

21. *Id.* at 320, 386.

22. 531 U.S. 98 (2000).

short of a judicial coup d'état.<sup>23</sup>

Clearly, we have here all the elements of a classic Hollywood arrogance-of-power thriller. Of course, alert readers might wish to know how Murphy could glean all this merely from the public sources he consulted in researching his subject. And the answer, of course, is that he couldn't. Instead, Murphy far too often substitutes editorializing and amateur psychologizing for sober, responsible scholarship.

Did Scalia violate “prevailing ethical norms” of the Court in making speeches and writing books defending a particular interpretive approach to constitutional decision-making? If he did, then the same charge can be leveled against Justices William Rehnquist,<sup>24</sup> William Brennan,<sup>25</sup> Stephen Breyer,<sup>26</sup> and many other recent members of the Supreme Court.<sup>27</sup>

Did Scalia's Ninograms and Ninofits drive conservative justices such as Sandra Day O'Connor and Anthony Kennedy towards the middle, effectively leaving Scalia as a “Court of one” and resulting in liberal victories on issues such as abortion, gay rights, and the death penalty? As Seth Stern notes, the real check on Scalia's effectiveness on the Court has probably been his uncompromising originalism, not his personality or his verbal attacks on his colleagues. As Stern says, it is far from “clear whether a cuddler yet equally inflexible Scalia would have done any better at building majorities.”<sup>28</sup>

Did Scalia covet and actively campaign for the Chief Justiceship after the death of William Rehnquist in 2005? Perhaps. But as Stern notes, Murphy's only evidence for this conclusion—other than his psychic mind-reading powers—is contemporary press speculation fueled by public speeches Scalia gave at the time.<sup>29</sup>

Murphy's various charges against Scalia strike me as a mixed bag.

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23. *Id.* at 270.

24. William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976); WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 306–19 (1987).

25. William J. Brennan, *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1986).

26. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005); STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW* (2010). It is misleading to suggest, as Murphy does, that Scalia spoke specifically about how we would rule in future cases. The great majority of his talks were “stump speeches” in which he discussed in general terms his approach to judging.

27. For a list of books written by Supreme Court Justices, see Ronald Clark, *353 Books by Supreme Court Justices*, SCOTUSblog, <http://www.scotusblog.com/2012/03/351-books-by-supreme-court-justices/>.

28. Seth Stern, *The Conservative Justice Liberals Love to Loathe*, WASH. POST (June 13, 2014), [http://www.washingtonpost.com/opinions/2014/06/13/58c8d308-e678-11e3-a86b-362fd5443d19\\_story.html](http://www.washingtonpost.com/opinions/2014/06/13/58c8d308-e678-11e3-a86b-362fd5443d19_story.html).

29. *Id.*

Some seem to be pretty well-documented, others are exaggerated, while some are wholly false.<sup>30</sup> I do not have space for anything like an adequate discussion of them here. So let me pick just one accusation to examine in detail: that of result-driven judicial activism. Does Scalia, as Murphy and many other liberal critics claim,<sup>31</sup> often abandon his originalist principles and instead decide cases by resort to his conservative personal or political values? In short, does Scalia practice the very kind of result-oriented activism that he so strongly condemns?

## II. WHY SCALIA IS NOT THE “FRAUD” LIBERALS LIKE TO THINK HE IS

To cut to the chase: The answer is “sort of.” No charge of frequent or overt inconsistency can be sustained, but there are aspects of Scalia’s approach to constitutional interpretation that are based on his conservative values and that lend themselves to a certain degree of judicial freewheeling.

Scalia himself has strongly denied that he ever allows his personal values to influence his decisions as a judge. He called Geoffrey Stone’s accusation that his rulings were influenced by his conservative religious beliefs a “damn lie.”<sup>32</sup> He also exchanged much-publicized barbs with Judge Richard Posner, who in a sharply critical review of Scalia and Garner’s book, *Reading Law*, suggested that a number of Scalia’s high-profile decisions were motivated by politics, not by his professed originalist methodology.<sup>33</sup> “I often come to decisions I don’t like,” Scalia insists.<sup>34</sup> Referring in a speech to his vote in *Texas v. Johnson*<sup>35</sup> to strike down laws that ban flag-burning as a political protest, Scalia remarked, “I don’t like scruffy, bearded, sandal-wearing people who go around burning the United States flag.”<sup>36</sup> In another speech he stated: “I have my rules that confine me. I’m looking for the original meaning, and when I find it I am handcuffed. I

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30. In a series of blogs for *National Review Online*, Ed Whelan has pointed out a number of significant factual errors in Murphy’s book, including a grossly inaccurate description of Scalia’s dissent in the important presidential-powers case, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). See Ed Whelan, *Bruce Allen Murphy’s Scalia: A Court of One* (April 21, 2014), <http://www.nationalreview.com/bench-memos376159/bruce-allen-murphys-scalia-court-one-part-1-ed-whelan>.

31. See, e.g., Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 389–95 (2000); Paul F. Campos, *Why Antonin Scalia is a Fraud*, SALON (Oct. 9, 2012), [http://www.salon.com/2012/10/09/why\\_antonin\\_scalia\\_is\\_a\\_fraud/](http://www.salon.com/2012/10/09/why_antonin_scalia_is_a_fraud/) (claiming that “Scalia is an intellectual fraud who uses a phony methodology to get whatever judicial outcomes align with his political preferences”).

32. Murphy, *supra* note 1, at 364.

33. Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (Aug. 24, 2012) (book review), <http://www.newrepublic.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism>.

34. Biskupic, *supra* note 10, at 8.

35. 491 U.S. 397 (1989).

36. *Id.*

cannot do *all* the mean conservative things I would love to do to this society.”<sup>37</sup>

Scalia freely admits that his voting record on the bench cannot be completely squared with the complex and sophisticated theory of legal interpretation recently set forth in *Reading Law*.<sup>38</sup> As we shall see, Scalia’s views on adjudication have evolved somewhat over the years. But his overall record, as Margaret Talbot has noted, “is remarkably free of contradiction.”<sup>39</sup>

Scalia has described himself as both an “originalist” and a “textualist” when it comes to interpreting the Constitution. He is an originalist because he believes that the Constitution means what it originally meant, and he is a textualist because he looks to the original “public” or “ordinary” meaning of legal texts—what the texts conventionally *say*—rather than to the subjective intentions or purposes of their drafters or adopters. In broad strokes, Scalia’s professed method of constitutional interpretation and adjudication is as follows:

1. In deciding constitutional cases, judges should (ordinarily) seek to discover and apply the “original meaning” of constitutional language. The only exceptions are when there are overriding pragmatic reasons for not applying original meaning, such as a conflict with settled precedent or deference to the ruling of a higher court.<sup>40</sup>
2. As with any legal text, the original meaning of the Constitution is its original public meaning. By “original public meaning,” Scalia means roughly the ordinary or conventional meaning of language, as that language was understood in its original context. More precisely, the original public meaning of a constitutional text is the meaning it would have conveyed to a hypothetical rea-

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37. Quoted in Margaret Talbot, *Supreme Confidence: The Jurisprudence of Justice Antonin Scalia*, THE NEW YORKER (March 23, 2005), at 55.

38. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012). Scalia explains these divergences as resulting either from “the demands of stare decisis or because wisdom has come too late.” *Id.*

39. Talbot, *supra* note 37, at 54.

40. For Scalia’s view of the role of *stare decisis* in constitutional decision making, see Scalia & Garner, *supra* note 38, at 411–13; and ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 138–40 (Amy Gutmann ed., 1997) [hereinafter *Interpretation*]. Scalia once described himself as a “faint-hearted originalist” because he would not be willing to apply original meaning if doing so would be too strong a medicine to swallow (as it would be, for instance, if judges were to uphold the constitutionality of flogging as a punishment for crime). Antonin Scalia, *Originalism: The Lesser Evil*, U. CIN. L. REV. 849, 864 (1989). Scalia has since repudiated this view, and now claims he would not strike down a law that authorized flogging. See MARCIA COYLE, *THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION* 165 (2013).

sonable reader at the time the text was enacted.<sup>41</sup> In many cases, the original public meaning of a constitutional provision is clear and unambiguous. If so, no further inquiries are needed; the language must be applied in its original conventional or ordinary meaning. If the language of a constitutional provision is unclear in context, judges should seek to determine and apply the “objectified” public meaning of the provision—that is, the meaning that a reasonable and appropriately informed citizen of the time would have given it.<sup>42</sup> This search for an objectified meaning may require significant historical research. However, the purpose of the search is not to discover the constitutional equivalent of legislative intent. It doesn’t matter what James Madison or any other framer or ratifier thought a particular constitutional phrase meant or implied. What matters is what linguistically permissible meaning a hypothetical reasonable reader at the time of enactment would have attributed to the phrase. In this way, Scalia hopes to avoid familiar problems with “summing” disparate legislative intentions, or pretending that there was a conscious, shared legislative intent, when the realities of modern lawmaking make this all but impossible.

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41. *Interpretation*, *supra* note 40, at 17. I am oversimplifying here. Scalia’s account of original public meaning also involves complexities about what kinds of context can and cannot be consulted by judges in ascertaining original meaning, as well as how judge-made interpretive rules—so-called “canons of construction”—affect meaning. For more on such complexities, see Bassham, *supra* note 11, at 213–16.

42. In his early years on the Court, Scalia frequently stated that judges should consult “tradition” when interpreting vague, abstract, or ambiguous constitutional language. See RALPH A. ROSSUM & ANTONIN SCALIA, JURISPRUDENCE: TEXT AND TRADITION 218 n. 5 (2006) (citing cases). Sometimes when Scalia speaks of “tradition” he seems to be referring both to the original public meaning of a text and to the way *later generations* understood and applied that text. See, e.g., *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95 (1990) (Scalia, J., dissenting); *United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting). Giving later generations a “meaning vote,” as it were, is clearly inconsistent with Scalia’s originalist methodology, and talk of “tradition” has largely dropped out of his more recent discussions of that methodology. One likely area in which Scalia would continue to look to post-enactment tradition is that of substantive due process. Scalia has argued that in deciding which rights should be considered “fundamental” for purposes of due-process analysis, courts should look to “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.” *Michael H. v. Gerald D.*, 491 U.S. 110, 127n. 6 (1989) (Scalia, J., plurality opinion). It should be noted, however, that Scalia accepts substantive due process only on grounds of *stare decisis*. See Scalia & Garner, *supra* note 38, at 413. Thus, this is not an exception to his view that constitutional meaning is fixed at the time of enactment.

3. In seeking to formulate and apply the original public meaning of constitutional texts, judges are not bound by the “specific intent” or expected applications of those texts. What is binding is what Scalia calls the “import” of constitutional language, the legal principle or rule the language was originally understood to enact.<sup>43</sup> Thus, it is irrelevant whether informed Americans in 1868 did not believe that the newly-enacted Equal Protection Clause of the Fourteenth Amendment banned segregated public education. The language of the clause is general and was clearly understood to prohibit state-sponsored discrimination against blacks.<sup>44</sup> The only time when expected applications are binding is when they are built into the import of constitutional language. In Scalia’s view, this is the case with a number of constitutional provisions, including the Eighth Amendment’s ban on the infliction of cruel and unusual punishments. Since, Scalia argues, the “whole purpose” of a constitution is “to prevent change,”<sup>45</sup> many abstract or broadly-worded constitutional phrases must be understood more narrowly than their words suggest. Fearing erosion of cherished values and suspicious of judicial activism, the Founders “meant to nail down current rights, rather than aspire after future ones.”<sup>46</sup> Thus, the Eighth Amendment prohibits only punishments *generally thought to be cruel* at the time the amendment was adopted. Scalia claims that the Equal Protection Clause and the Due Process Clauses also had relatively narrow original meanings that were “well understood and accepted”<sup>47</sup> at the time of adoption. In such cases, no sharp distinction can be drawn between the

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43. *Interpretation*, *supra* note 40, at 144.

44. *See* Scalia & Garner, *supra* note 38, at 87–88.

45. *Id.* at 40.

46. *Id.* at 135. Scalia recognizes that constitutional language is sometimes intentionally elastic. Thus, the Fourth Amendment’s ban on “unreasonable searches and seizures” is not, and was not intended to be, limited to the sorts of searches familiar to Americans in 1791. The Framers deliberately chose language that was broad enough to apply to types of searches they did not, and could not, have foreseen. *See* *Kyllo v. U. S.*, 533 U.S. 27 (2001) (Scalia, J., opinion of the Court) (holding that use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a “search” within the meaning of the Fourth Amendment). Scalia stated in his Senate nomination hearings in 1986 that he believed “that there are some provisions of the Constitution that may have a certain amount of evolutionary content within them.” *Quoted in* Murphy, *supra* note 1, at 130.

47. Scalia & Garner, *supra* note 38, at 85.



“import” of constitutional language and its expected applications.

Now that we have a clear picture of Scalia’s professed originalist methodology, we can ask how consistently he applies it. Is it true that Scalia regularly makes judicial decisions that are fueled more by politics than by principle?

Who is it that accuses Scalia of inconsistency? Interestingly, the charges come from both the left and the right. Let’s start with the latter. The three most common conservative charges are that Scalia: (1) sometimes engages in amateurish, result-driven “law office history” by allowing his conservative values to skew his historical judgments of original public meaning; (2) is too deferential to non-originalist precedent, such as the doctrine that the Fourteenth Amendment “incorporates” most of the Bill of Rights, making those provisions binding on the states; (3) and often adopts “liberal,” non-originalist positions on free-speech cases.

First, the charge of law office history: this was a much-publicized<sup>48</sup> accusation raised by two prominent conservative judges, Richard Posner and J. Harvey Wilkinson, in connection with Scalia’s majority opinion in *D.C. v Heller*,<sup>49</sup> the landmark gun-control case, in which the Court ruled for the first time that the Second Amendment protects an individual’s right to own firearms for purposes of self-protection. Wilkinson argued that the decision was not defensible on originalist grounds, because a right to bear arms in self-defense could not be inferred either from the text of the Second Amendment or from a fair historical investigation of the original public meaning or understanding of the text.<sup>50</sup> Judge Posner went farther, claiming that the historical evidence pretty clearly does *not* support a personal right to bear arms, and that Justice Scalia twisted history in order to arrive at the result that accorded with his conservative preferences.<sup>51</sup>

Suppose Wilkinson and Posner are correct in thinking that Scalia got the historical evidence wrong in *Heller*. What follows? Only that originalist approaches like Scalia’s aren’t guaranteed to produce correct answers, even in terms of their own standards of correctness. But isn’t this true of pretty much *any* plausible theory of constitutional interpretation? Only implausible, formalistic theories of constitutional adjudication leave no room for mistaken inferences, inadequate research, or errors of judgment. Unless Wilkinson and Posner can show that Scalia knew or should have known

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48. See, e.g., Adam Liptak, *Ruling on Guns Elicits Rebuke from the Right*, NEW YORK TIMES (Oct. 20, 2008), <http://www.nytimes.com/2008/10/21/washington/21guns.html?pagewanted=all>.

49. 554 U.S. 570 (2008).

50. J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 267 (2009).

51. Posner, *supra* note 33.

that he was distorting the historical record, no serious charge of inconsistency can be sustained.

A second criticism some conservatives make of Scalia's brand of originalism is that it is overly accommodating of nonoriginalist precedent. For instance, conservative constitutional scholar Ralph Rossum faults Scalia for accepting both incorporationism and a limited doctrine of substantive due process, even though neither can be squared with Scalia's originalism.<sup>52</sup>

Scalia has made clear that he accepts incorporationism and—to a limited extent—substantive due process only because he considers them entrenched norms so deeply embedded in modern constitutional doctrine as to be effectively irreversible.<sup>53</sup> Scalia's acceptance of settled law is part of his general theory of constitutional adjudication, of which originalism is only a part. Rossum's real complaint, therefore, is that Scalia should adopt a *different* theory of constitutional decision making, not that he is unfaithful to the one he has.

A similar response can be made to the charge that Scalia abandons his originalist principles in supporting "liberal" positions on issues such as the constitutionality of bans on politically-motivated flag-burning<sup>54</sup> and racially-motivated cross-burning.<sup>55</sup> In point of fact, such decisions are consistent with Scalia's long-held view that "speech," for First Amendment purposes, includes any kind of "communicative activity,"<sup>56</sup> including expressive conduct. As he sees it, laws that target expressive conduct such as flag-burning or cross-burning "precisely because of its communicative attrib-

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52. ROSSUM, *supra* note 42, at 169.

53. *See* Scalia & Garner, *supra* note 38, at 412–13.

54. *Texas v. Johnson*, 491 U.S. 397 (1989) (joining Justice Brennan's opinion for the Court striking down a Texas law that made it a crime to intentionally or knowingly desecrate a state or national flag); *U. S. v. Eichman*, 496 U.S. 310 (1990) (joining Justice Brennan's opinion reaching a similar conclusion regarding a federal statute).

55. *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) (invalidating a St. Paul ordinance that criminalized cross-burning and other bias-motivated acts). Speech is not the only area in which Scalia consistently adopts "liberal" positions. *See, e.g., Maryland v. King*, 569 U.S. 1958 (2013) (Scalia, J. dissenting) (arguing that Maryland's practice of collecting DNA samples from all persons arrested for serious crimes is unconstitutional); *Crawford v. Washington*, 541 U.S. 36 (2004) (expanding criminal defendants' rights to "confront" hostile witnesses); *Blakely v. Washington*, 542 U.S. 296 (2004) (invalidating mandatory sentencing guidelines that permitted judges to enhance criminal penalties based on facts that were not decided by a jury or admitted by the defendant); *Nat'l Treasury Emp. Union v. Von Raab*, 489 U.S. 656 (1989) (Scalia, J. dissenting) (arguing against the constitutionality of random drug searches for certain employees of the U.S. Customs Service).

56. Senate Confirmation Hearing on the Nomination of Judge Antonin Scalia to be Associate Justice of the Supreme Court of the United States, Aug. 5–6, 1986, at 51, <http://www.loc.gov/law/find/nominations/scalia/hearing.pdf>.

utes”<sup>57</sup> presumptively violate the First Amendment. This is not a view he defends on originalist grounds. In fact, Scalia rarely delves into issues relating to the original meaning of the Constitution’s freedom of speech and press clauses.<sup>58</sup> Evidently he considers these as areas of substantially “settled law.”

Let us consider, next, charges of inconsistency frequently made by liberal critics of Justice Scalia. I shall examine four: that Scalia (1) says that he looks for “original meaning” but in reality often privileges “original expected applications;” (2) defends a distinctly non-textualist reading of the Eleventh Amendment; (3) had no proper textualist basis for concluding in *Citizens United*<sup>59</sup> that corporations are “persons” or that money is “speech;” and (4) blatantly abandoned all of his originalist principles in *Bush v. Gore*.<sup>60</sup>

Many liberal critics accuse Scalia of inconsistency in his treatment of what are called original “expected applications.”<sup>61</sup> As we have seen, Scalia professes to look for the “original meaning” of constitutional texts, not for the “original intentions” of the framers, ratifiers, or citizenry. So, for example, in interpreting the Fourth Amendment’s prohibition on “unreasonable searches and seizures,” the goal is not to determine the adopters’ scope beliefs—the specific acts they believed the Amendment would proscribe—but rather the general principle they understood the Amendment to enact—a principle that, properly understood, may not comport with all of the adopters’ specific expectations. Yet time and again, Scalia does seem to treat original expected applications as decisive.<sup>62</sup> On the face of it, this is a

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57. *Barnes v. Glen Theatre, Inc.*, 501 U. S. 569, 577 (1991) (Scalia, J., concurring).

58. In comments off the Court, Scalia has made clear that he thinks the original meaning of “freedom of speech” is roughly “speech rights generally recognized by the founding generation.” See Lauren Rubenstein, *Justice Scalia Delivers Defense of Originalism at Hugo Black Lecture*, News @ Wesleyan (March 26, 2012), at <http://newsletter.blogs.wesleyan.edu/2012/03/26/scaliahugoblack/>; Laurence Tribe, *Comment*, in *Interpretation*, *supra* note 40, at 79–80 (reporting a similar oral pronouncement). This is consistent with his general view that the Bill of Rights was intended to protect then-recognized rights, not open the door to novel rights. See *Interpretation*, *supra* note 40, at 135.

59. *Citizens United v. Fed. Election Commission*, 558 U. S. 310 (2010) (holding that corporate political speech is protected by the First Amendment).

60. 531 U. S. 98 (2000).

61. See, e.g., Jack M. Balkin, *LIVING ORIGINALISM* 100–01 (2011); Ronald Dworkin, *Comment*, in *Interpretation*, *supra* note 40, at 120–21.

62. See, e.g., Scalia & Garner, *supra* note 37, at 407 (claiming that the Eighth Amendment’s prohibition of cruel and unusual punishments permits any manner of imposing the death penalty “that is less cruel than hanging, which was an accepted manner in 1791”); *Id.* at 400 (arguing that historical inquiry demonstrates that the Second Amendment was understood to guarantee a right to keep and bear arms for personal use, including self-defense); Mark Sherman, *Death Penalty, Abortion, ‘Homosexual*

glaring inconsistency.

We have seen, however, that Scalia believes that with many constitutional texts no sharp distinction can be drawn between original meaning and expected applications. Since, in his view, the whole purpose of a constitution is to prevent change and to nail down existing rights, it would make no sense for the adopters to enact abstract principles that later generations could use to recognize novel rights and to abridge traditional ones. True, the adopters often used broad and general language (“equal protection of the laws,” “freedom of speech,” “due process of law,” “cruel and unusual punishments”), but as with similar phrases in state constitutions, it was well-understood that such language had relatively narrow and precise meanings.

While I have argued elsewhere against this view of original meaning,<sup>63</sup> it is by no means wholly implausible. If the Constitution’s “majestic generalities” were understood to enact broad, elastic principles, one would expect to find some evidence of this in early case-law and in the writings of early constitutional commentators such as Joseph Story. What we find, instead, are usually interpretations far narrower than the words suggest.<sup>64</sup> Such readings were in accordance with then-widely accepted canons of legal interpretation, including the maxim that general language should be construed “equitably” so as not to violate the intent or purpose of the lawmaker.<sup>65</sup> Moreover, the founding generation was opposed to judicial policymaking,<sup>66</sup> something that obviously would have been invited had the framers intended their language to be highly abstract or to have evolving

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*Sodomy’ Are Easy Cases*, HUFFINGTON POST (Oct. 5, 2012) (quoting a 2012 speech by Justice Scalia in which he states, “The death penalty? Give me a break. It’s easy. Abortion? Absolutely easy. Nobody ever thought the Constitution prevented restrictions on abortion. Homosexual sodomy? Come on. For 200 years, it was criminal in every state”).

63. See Bassham, *supra* note 11, at 218–28; and Gregory Bassham, *Justice Scalia’s Equitable Constitution*, 33 J. C. & U. L. 143, 164 (2006) [hereinafter *Equitable*].

64. See generally RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977) (providing evidence that terms such as “due process,” “privileges and immunities,” and “equal protection of the law” were originally understood much more narrowly than their words might suggest); and JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* §§ 1851–1902 (1833) (assigning distinctly narrow meanings to terms like “freedom of speech,” “free exercise of religion,” and “establishment of religion”). Story’s explication of the Establishment Clause is startling to modern ears. On his view, even overt governmental support for Christianity would not constitute an “establishment of religion.” *Id.* at §1867.

65. See William N. Eskridge, Jr., *Textualism, the Unknown ideal?*, 96 MICH. L. REV. 1509, 1523–26 (1998) (book review). Scalia, of course, purports to reject such “equitable” interpretations. I have argued, however, that in practice Scalia often embraces something very similar to an equitable approach. See *Equitable*, *supra* note 63, at 157–63.

66. See Berger, *supra* note 64, at 300–11.

meanings. The fact that only one federal law was declared unconstitutional between 1789 and 1856 is further evidence that original meanings were believed to be narrow.<sup>67</sup> So, too, is the way that federal and state judges consistently resisted the broad readings of constitutional language urged by opponents of slavery.<sup>68</sup>

The issue here is not whether Scalia is correct in this view of the original public meanings of the Constitution's general phrases, but whether he sticks to that reading consistently. So far as I can see, he does.<sup>69</sup>

Another area in which liberals frequently charge Scalia with inconsistency is that of Eleventh-Amendment state sovereignty jurisprudence.<sup>70</sup> The Eleventh Amendment, proposed by Congress in 1794 and quickly ratified by the states in 1795, was a repudiation of the Supreme Court's decision in *Chisholm v. Georgia*,<sup>71</sup> permitting States to be sued in federal court by citizens of other States and denying that States are truly "sovereign" in a federalist system of government in which ultimate sovereignty lies with the people. The Eleventh Amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by citizens or subjects of any foreign state." On its

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67. I am speaking, of course, of *Marbury v. Madison* (1803) (striking down section 13 of the Judiciary Act of 1789).

68. See generally ROBERT COVER, *JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS* (1975).

69. The one possible exception that sticks out is Scalia's originalist reading of the Equal Protection Clause. He seems to take the view that the Clause, at its core, bans state-sponsored racial discrimination. He acknowledges, however, that the Clause also prohibits denials of equal-protection "on the basis of age, property, sex, 'sexual orientation,' or for that matter even blue eyes and nose rings." *Interpretation, supra* note 40, at 148. This makes it sound like he accepts a fairly abstract reading of the Clause. But this isn't the case. For Scalia immediately adds that in determining the scope of "equal protection" we must stick to the "time-dated" expectations at the time of adoption. *Id.* at 149. Scalia does accept, *on grounds of settled precedent*, certain non-originalist constructions of equal-protection. For example, he acknowledges that the Clause prohibits discrimination in voting rights (*Bush v. Gore*, 531 U. S. 98 (2000)), although this was clearly not the understanding of the adopters. Berger, *supra* note 64, at 52-64. See also *U. S. v. Virginia*, 518 U.S. 515 (1996) (Scalia, J. dissenting) (accepting intermediate scrutiny as the proper standard for evaluating classifications based on sex, despite the fact that this was clearly not the original understanding). On the whole, then, Justice Scalia's approach to equal protection analysis appears to be consistent with both his originalism and his general theory of adjudication.

70. See, e.g., Balkin, *supra* note 61, at 454 n. 39; Herman Schwartz, *The States' Rights Assault on Federal Authority*, in *THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT* 160 (Herman Schwartz ed., 2002); Ernest A. Young, *Alden v. Maine and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1622 (2000). The charge is also made by some conservatives. See, e.g., ROSSUM, *supra* note 42, at 106-14; Randy E. Barnett, *The People or the State: Chisholm v. Georgia and Popular Sovereignty*, 93 VA. L. REV. 1729, 1752 (2007).

71. 2 U. S. (2 Dall.) 419 (1793).

face, the meaning of the amendment is narrow and precise. Yet for over a century the Supreme Court has interpreted the amendment broadly, as affirming a robust doctrine of sovereign immunity. Under this broader reading, courts have extended this immunity to suits in federal *or State* courts filed by a State's *own citizens*, federal corporations, tribal sovereigns, and foreign nations. Justice Scalia supports this wider reading, arguing that "the Eleventh Amendment was important not merely for what it said but for what it reflected: a consensus that the doctrine of immunity . . . was part of the understood background against which the Constitution was adopted, and which its jurisdictional provisions did not mean to sweep away."<sup>72</sup> The critics' claim is that such an expansive reading is justifiable, at best, by appeal to the underlying "purpose" or "intent" of the Eleventh Amendment's framers—a nontextualist approach that Scalia rejects.

Given his general approach to legal interpretation, there are two ways in which Justice Scalia could reply. One is to note that he does *not* equate textualism with literalism or "strict constructionism." He recognizes that original public meanings may be significantly broader or narrower than a literal reading would suggest.<sup>73</sup> Thus, he could argue that the original "import" of the Eleventh Amendment was a good deal broader than its words alone would indicate.

A second possible response would be to retain a more or less literal reading of the Eleventh Amendment, but argue for a strong principle of state sovereign immunity on *structural* grounds. Scalia joined Justice Kennedy's majority opinion in *Alden v. Maine*,<sup>74</sup> making just such an argument. Kennedy acknowledged that no doctrine of sovereign immunity that applied to *state* courts interpreting *state* law could be grounded in the Eleventh Amendment, which of course only applies to federal courts. Instead, he reasoned that the Constitution's "structure" and "history" make clear that States' immunity from suit is a fundamental aspect of the sovereignty they enjoyed prior to entering the Union.<sup>75</sup> Justice Scalia agrees, claiming

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72. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 44–45 (1989) (Scalia, J., dissenting).

73. See Scalia & Garner, *supra* note 38, at 37 (arguing that, on textualist grounds, an ordinance banning "vehicles" from public parks should be interpreted as applying only to *sizable wheeled* vehicles, not to baby carriages or snowmobiles, as a literal reading would suggest. Likewise, he would argue that although the First Amendment literally applies only to "law[s]" that "Congress" may enact, a proper textualist reading would recognize that it also applies to acts of the President, courts, police, administrative agencies, the military, public schools, etc.

74. 527 U.S. 706 (1999).

75. It is by no means clear that Kennedy was correct in this originalist analysis. A serious case can be made that Article III, Section 2, of the original Constitution did, as originally understood, put at least a significant dent in the traditional doctrine of sovereign immunity. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 332–36 (2005). One strong textual argument for this—noted by several Justices in

that the principle of sovereign immunity is an “axiom of our jurisprudence”<sup>76</sup> and implicit in the structure of our federalist system of divided sovereignty.

But is such a structuralist interpretation consistent with Scalia’s textualism? Yes, Scalia recognizes that legal interpretation is a “holistic endeavor”<sup>77</sup> and that legal texts “must be construed as a whole.”<sup>78</sup> Textualists need not be “strict constructionists” or “clause-bound” textualists.<sup>79</sup> A legal text, Scalia claims, “should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.”<sup>80</sup> For a textual basis for a robust doctrine of state sovereign immunity Scalia might appeal to the term “State” in its various uses in the Constitution, with all that term connoted to eighteenth-century Americans imbued with the common law and Blackstonian jurisprudence.<sup>81</sup> But there is nothing inconsistent about a textualist of Scalia’s stripe<sup>82</sup> inferring implications from the broad structure of a legal text. Structural principles that are basic to American constitutional theory, such as “separation of powers,” “checks and balances,” “the rule of law,” and (Scalia’s favorite) “democratic self-government” are nowhere explicitly mentioned in the Constitution.<sup>83</sup> Textualists like Scalia need not read texts woodenly and acontextually; they can read them holistically, as typical “reasonable readers” presumably would. Thus, there is no valid basis for concluding that Justice Scalia’s views on state sovereign immunity are out of step with his

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*Chisholm*—is that Article III extends federal judicial power to “controversies between two or more States.” If States could never be *defendants* in federal courts without their consent, as opponents of *Chisholm* claimed, how could there be any such “controversy”? In every suit, one party must be the defendant. Of course, the larger question is one of federal supremacy. If States can’t be sued in federal court, even in cases that involve federal issues, then they would be free to violate federal rights at will and no national constitutional jurisprudence could be developed. On this point, John Marshall had the final word. See *Cohens v. Virginia*, 19 U.S. 264 (1821).

76. Scalia & Garner, *supra* note 38, at 281 (quoting *Price v. United States*, 174 U.S. 373, 375–76 (1899) (Brewer, J.)).

77. *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988) (Scalia, opinion for the Court).

78. Scalia & Garner, *supra* note 38, at 167.

79. *Id.* at 355–58.

80. *Interpretation*, *supra* note 40, at 23.

81. See Michael A. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court’s Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 830 (1999).

82. Elsewhere, I have argued that Scalia is an “ersatz” textualist. See *Equitable*, *supra* note 63, at 151–57. Given the significant weight he gives to nonoriginalist precedent, the wide departures from literal meaning he allows, and the invocation of canons of construction that often run counter to textual meaning, he is far from being a strict textualist, and perhaps should not be considered a textualist at all.

83. See Balkin, *supra* note 61, at 142.

general approach to constitutional adjudication.<sup>84</sup>

A third area in which liberals frequently accuse Justice Scalia of unprincipled, result-driven inconsistency is that of campaign finance law, particularly with respect to the Court's deeply controversial 5–4 decision in *Citizens United*,<sup>85</sup> which struck down federal laws limiting the ways in which corporations could spend money to influence elections. The decision has been widely attacked by liberal critics as flatly inconsistent with conservative principles of judicial restraint and originalist interpretation.<sup>86</sup>

I will address the complex issue of “judicial restraint” at the conclusion of this review. Here, I will simply speak to the charge of abandoning originalism.

It is indeed striking how little discussion there is of “original meaning” in *Citizens United*. In his opinion for the Court, Justice Kennedy devotes only a single paragraph to the issue. Justice Stevens, in his lengthy dissent, faults the Court for invoking the Framers “without seriously grappling with their understandings of corporations or the free speech right.”<sup>87</sup> Stevens himself conducts a brief foray into originalist analysis and concludes that the evidence “appear[s] to cut strongly”<sup>88</sup> the other way. He argues that “there is not a scintilla of evidence” that members of the founding generation “believed it would preclude regulatory distinctions based on the corporate form.”<sup>89</sup> Moreover, the “cautious view” the founders took of corporate power, the “narrow view” they had of corporate rights, the fact that they “conceived of speech more narrowly than we now think of it,” and the “individualistic” way they conceptualized speech right—all point against the majority's view.<sup>90</sup> In the final analysis, Stevens concludes, “we cannot be certain” how campaign finance laws like those at issue in *Citizens United* mesh with the original meaning of the First Amendment. He notes, how-

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84. It should also be noted that a broad reading of the Eleventh Amendment is supported by a long line of cases and an unusually extensive history of legislative and judicial reliance. It could thus be defended on grounds of *stare decisis* as “settled doctrinal understanding.” *Alden v. Maine*, 527 U.S. 706, 728 (1999) (Kennedy, J., opinion of the Court); *Welch v. Texas Dep't of Highways*, 494 U.S. 468, 494–95 (1987) (per Powell, J., citing cases that would be overruled if the Court were to adopt the narrower reading favored by the four dissenters in that case).

85. *Citizens United v. Federal Election Commission*, 558 U. S. 310 (2010), No. 08–205.

86. See, e.g., Geoffrey Stone, *Citizens United and Conservative Judicial Activism*, 2012 U. ILL. L. REV. 485, 499; Ronald Dworkin, *The “Devastating” Decision*, *The New York Review of Books* (Feb. 25, 2010), <http://www.public.iastate.edu/~jwcvolf/Law/DworkinCitizensUnited.pdf>; Gene Nichol, *Citizens United and the Roberts Court War on Democracy*, 27 GA. ST. L. REV. 1007, 1009 (2010).

87. *Citizens United*, 558 U. S. at 432.

88. *Id.* at 426.

89. *Id.*

90. *Id.*



ever, that the Court's "campaign finance jurisprudence has never attended very closely to the views of the Framers,"<sup>91</sup> and it is clear from the brevity of his discussion of original meaning that he believes that this is as it should be.

Scalia wrote a concurrence briefly replying to Stevens' historical argument. Its aim is to counter Stevens' argument rather than to argue in a sustained way that restrictions on corporate political speech are at odds with the original meaning of the First Amendment. The central thrust of his reply is that the text of the First Amendment is unqualified; it applies to "speech" with no indication that corporate speech is excluded or entitled to less protection. Business corporations, he argues, were a familiar feature of American economic life at the end of the eighteenth century. The fact that the founding generation had a generally negative view of corporations does not prove that they were excluded from First Amendment protection, and such attitudes may have reflected monopolistic concerns that no longer apply to modern business corporations. Moreover, in the founding era there were many non-business corporations or near-corporations, such as religious, educational, or literary associations, that frequently expressed their views in newspapers and pamphlets. There is no evidence that these groups' speech was regarded as unprotected by the First Amendment. Finally, Scalia argues that while Stevens is no doubt right that the Framers had in mind the rights of individual men and women, those individual rights included the right to speak in association with others.

My interest here isn't whether Scalia's reply to Stevens is convincing, but whether he abandons his professed jurisprudential principles in *Citizens United*. I see no reason to think that he does. Like Stevens, Scalia pretty clearly does not see the issue of "original meaning" as being the crucial issue at stake. Both the majority (which Scalia joined) and the dissent devote nearly all of their attention to two issues: the bearing of prior case-law on the decision and whether there are any compelling governmental interests that justify the restrictions on what all sides admit is a core First Amendment value: political speech. In Scalia's lengthy dissents in *Austin v. Michigan Chamber of Commerce*<sup>92</sup> and *McConnell v. FEC*<sup>93</sup>—the two major cases overruled in *Citizens United*—he also focuses almost exclusively on these non-originalist issues. Evidently he believes that campaign finance law is an area which precedent and judge-made constitutional doctrine—not original meaning—must provide the basic principles for analysis. This is consistent with his overall jurisprudential approach.

We turn, finally, to the big kahuna: *Bush v. Gore*.<sup>94</sup> Is it true, as Murphy

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91. *Id.* at 432.

92. 494 U.S. 652 (1990).

93. 540 U.S. 93 (2003).

94. 531 U.S. 98 (2000).

harshly claims, that Scalia's arguments and motives in that case "had nothing to do with originalism or any other reading of the Constitution," but rather "had everything to do with his evaluation of the raw politics of the situation"<sup>95</sup>

*Bush v. Gore* is a complex and highly unusual case. Oral arguments were heard in the late morning of one day (December 11, 2000), and the case was decided by the evening of the next.<sup>96</sup> As such, it is not a good test case to evaluate general jurisprudential consistency, since there simply wasn't time for the Justices to think deeply about how their opinions fit with current law and their own past rulings. Nevertheless, I believe that the approach Justice Scalia took in that case is not a significant departure from his professed principles.

*Bush v. Gore* was the culmination of a tumultuous 36-day controversy that ended in the election of Republican candidate George W. Bush over the Democratic candidate, Al Gore, in the 2000 presidential election. The controversy centered on Florida, where Bush won by a razor-thin margin of 1,784 votes, giving him a narrow electoral victory. A mandatory recount the following day narrowed Bush's margin to 327 votes. Gore filed a protest, asking for manual recounts in the four most Democratic-leaning counties in the state. Bush filed suit in federal court asking that the selective recounts be stopped, but this was denied. On November 17, the Florida Supreme Court blocked Florida Secretary of State Katherine Harris (an open Bush partisan) from certifying Bush the winner. Four days later, in a unanimous ruling, the Florida Supreme Court ordered the recounts to continue and extended the certification date until November 26. Bush appealed to the U.S. Supreme Court, which heard the case on December 1. On November 26, Secretary Harris certified Bush the winner by 537 votes, even though two counties had not yet completed their recounts. On December 4, the U. S. Supreme Court (in "Bush I") unanimously vacated the November 21 Florida Supreme Court ruling, finding that there was considerable uncertainty about its basis and asking for clarification. On December 8, the Florida Supreme Court, relying on its vacated earlier decision and ignoring the U.S. Supreme Court's request for clarification, ordered a statewide manual recount of an estimated 60,000 "undervotes"<sup>97</sup> in the 64 Florida counties that had not yet counted them. Bush again appealed to the U. S. Supreme Court, which, divided 5-4, issued a stay of the Florida Court ruling on December 9 and scheduled oral argument for December 11. The

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95. Murphy, *supra* note 1, at 270.

96. For an excellent (but critical) account of the case, see JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 141-77 (2007).

97. An "undervote," in the present context, was a ballot in which no vote for president was registered by voting machines, even though some of the ballots were marked in ways that indicated a clear intent to vote.

following day, December 12, the Court ruled 5–4 to halt the recounts, effectively ending the controversy and awarding the presidency to Bush.<sup>98</sup>

There were two central issues in *Bush v. Gore*: (1) Did the ordered statewide recount violate the U. S. Constitution? (2) If so, what is the proper remedy? By a 7–2 vote, the Court found that the recount was unconstitutional. Specifically, the Court pointed to the lack of uniform counting standards, resulting in arbitrary and disparate treatment of equally-situated voters. This, the Court found, was inconsistent with the Equal Protection Clause’s mandate that states may not “value one person’s vote over that of another.”<sup>99</sup> The five most conservative members of the Court (Justices Scalia, Thomas, O’Connor, Kennedy, and Chief Justice Rehnquist) ruled that there was no possible remedy for this equal-protection violation, given the Florida Supreme Court’s determination that the Florida legislature intended to meet the federal “safe harbor” deadline for selection of the state’s presidential electors without risk of congressional challenge—a deadline that then was mere hours away. However, two of the Justices who agreed that the Florida court ruling violated equal-protection—Justices Breyer and Souter—argued that Florida should be given time to establish uniform counting procedures, so that a fair recount could be completed.

Equal protection was not the only constitutional issue in *Bush v. Gore*. Two Justices (Scalia and Thomas) joined a concurrence by Chief Justice Rehnquist, arguing that the Florida court ruling also violated Article II, Section 1, Clause 2 of the Constitution, which provides that “[e]ach State shall appoint, in such manner as the Legislature thereof may direct,” electors for President and Vice President. According to these Justices, the Florida Supreme Court following the election changed Florida election law in ways that failed to accord due deference to the legislature’s plenary authority to determine the manner in which Florida’s electors are selected.

We thus have three questions to consider: Did Justice Scalia abandon principle for politics in (a) supporting the Court’s equal-protection holding, (b) arguing for an Article II violation, and (c) voting to end the recounts?

Why is Scalia’s equal-protection holding alleged to be unprincipled? Two reasons are commonly given: (1) The holding can’t be justified on originalist grounds,<sup>100</sup> and (2) the decision can’t be squared with Scalia’s

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98. For a detailed chronology of the events leading up to *Bush v. Gore*, see ARTHUR J. JACOBSON & MICHAEL ROSENFELD, *THE LONGEST NIGHT: POLEMICS AND PERSPECTIVES ON ELECTION 2000* 24–41 (2002).

99. *Bush v. Gore*, 531 U.S. 98, at 104–05 (per curiam).

100. See, e.g., Cass R. Sunstein, *Does the Constitution Enact the Republican Party Platform? Beyond Bush v. Gore*, in *BUSH V. GORE: THE QUESTION OF LEGITIMACY* (Bruce Ackerman ed.) 184 (2002); Adam Cohen, *Scalia Mouths Off on Sex Discrimination*, *Time* (Sept. 22, 2010), <http://content.time.com/time/nation/article/0,8599,2020667,00.html>.

usually quite narrow reading of the Equal Protection Clause.<sup>101</sup>

By now it should be clear why Scalia cannot be faulted for failing to invoke the original meaning of the Equal Protection Clause in *Bush v. Gore*. Even though the Court's equal-protection analysis probably is inconsistent with Scalia's original-meaning methodology,<sup>102</sup> it has been settled constitutional doctrine since the mid-1960s that the Equal Protection Clause applies to voting rights.<sup>103</sup> Under longstanding equal-protection doctrine, the right to vote is a "fundamental right"<sup>104</sup> deserving of strict judicial scrutiny. Over the past half-century, it has been taken for granted at the federal, state, and local level, that there are equal-protection constraints on limitations of voting rights.<sup>105</sup> Thus, it is entirely consistent with Justice Scalia's general theory of constitutional adjudication that he would bow to well-established precedent, rather than invoke original meaning in *Bush v. Gore*.

Is the equal-protection argument sound, or at least plausible? A number of distinguished constitutional theorists—both liberal and conservative—have argued that it is.<sup>106</sup> Under the vague "clear intention of the voter"

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101. See, e.g., Geoffrey R. Stone, *Equal Protection? The Supreme Court's Decision in Bush v. Gore*, <http://fathom.lib.uchicago.edu/1/777777122240/>; Robert Post, *Sustaining the Premise of Legality: Learning to Live with Bush v. Gore*, in Ackerman, *supra* note 100, at 98; Margaret Radin, *Can the Rule of Law Survive Bush v. Gore?*, *Id.* at 117.

102. See Berger, *supra* note 64, at 52–64; *Reynolds v. Sims*, 377 U.S. 533, 593–608 (Harlan, J., dissenting). Recall that it required a further constitutional amendment (the Fifteenth) to outlaw racial discrimination in voting. In fact, the Fourteenth Amendment (in section 2) specifically contemplates denial of voting rights by States, merely reducing the offending States' representation in Congress by a proportional amount as a penalty. As we have seen, it is not clear what Scalia thinks the Equal Protection Clause originally meant. But given his claim that the Clause must be interpreted in accordance with the "time-dated" expectations that reasonable readers would have shared at the time of adoption (*Interpretation*, *supra* note 40, at 140), it is likely that he would deny that original meaning guarantees equal voting rights.

103. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964); *Harper v. Virginia Board of Elections*, 383 U. S. 663 (1966). Of course, on pragmatic grounds Scalia might have wanted to not muddy the waters in such an important case by filing a separate concurrence delving into the original meaning of the Equal Protection Clause. There wasn't time to do this, even if he had wished.

104. *Harper v. Virginia Board of Elections*, 383 U. S. 667, 670 (1966); *Kramer v. Union Free School District No. 15*, 395 U. S. 621, 626–27 (1969).

105. See generally LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 2d ed. 1062–95 (1988).

106. See, e.g., Mark Tushnet, *The Conservatism in Bush v. Gore*, in Ackerman, *supra* note 100, at 167; Ronald Dworkin, *A Badly Flawed Election*, *New York Review of Books* (January 11, 2001), reprinted in *A BADLY FLAWED ELECTION: DEBATING BUSH V. GORE, THE SUPREME COURT, AND AMERICAN DEMOCRACY* 66 (Ronald Dworkin ed., 2002); Stone, *supra* note 101; Charles Fried, *An Unreasonable Reaction to a Reasonable Decision*, in Ackerman, *supra* note 100, at 12–15; Michael W. McConnell, *Two and a Half Cheers for Bush v. Gore*, in *THE VOTE: BUSH, GORE, AND THE SUPREME COURT* 103–04 (Cass R. Sunstein & Richard A. Epstein eds., 2001).

standard set forth by the Florida court, vote-counting practices varied widely not only from county to county, but even within counties from one recount team to another. Perhaps even more importantly, the Florida court permitted so-called “overvotes” (i.e., ballots that registered more than one vote for president) to be counted in several Democratic-leaning counties but not statewide.<sup>107</sup> This was significant, because as later analyses confirmed, overvotes tended to favor Gore.<sup>108</sup>

On the other hand, a strong case can be made against the Court’s equal-protection holding. The ruling was not strongly rooted in precedent; it ignored what are arguably much more severe equal-protection issues (such as ballot-design and radical disparities resulting from vote-counting technologies); it failed to consider the critical comparative question of whether a recount would have been *more fair* than the manifestly flawed certified result; it ignored the fact that, contrary to Florida law, no automatic recounts were conducted in 18 of Florida’s 67 counties in the days immediately following the election; and by halting the recount, the Court itself ensured that some legal votes would not be counted.<sup>109</sup>

All of this is arguable. My point is simply that no clear-cut case can be made that Justice Scalia was hypocritical in joining the Court’s equal-protection holding.

This is also the case with the Article II argument. On originalist grounds, a reasonable argument can be made that Article II vests state legislatures with plenary (or virtually plenary) authority for selecting their presidential electors.<sup>110</sup> This ensures that the electors are chosen by the most democratic branch of state governments, and also that they will be chosen in accordance with rules that have been laid down in advance. As many commentators have shown, a number of the Florida court’s post-election rulings cannot plausibly be viewed as mere “interpretations” of Florida election law. In a variety of ways, too numerous to discuss here, the Court *changed* that law in ways that failed to accord due deference to the Florida legislature.<sup>111</sup> It is no surprise that Justice Scalia, as an original-

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107. Richard A. Posner, *Bush v. Gore: Prolegomenon to an Assessment*, in Sunstein & Epstein, *supra* note 106, at 181.

108. *Second Review of Florida Presidential Vote is Inconclusive*, N.Y. TIMES (May 11, 2001), <http://www.nytimes.com/2001/05/11/politics/11COUN.html>.

109. See Laurence Tribe, *eroG .v hsuB: Through the Looking Glass*, in Ackerman, *supra* note 100, at 43–56. Numerous critics also criticize the Court for limiting its equal-protection holding to “the present circumstances,” thereby abandoning its supposed duty to speak in terms of neutral principles of general applicability. In this case, however, such a restriction makes sense. The equal-protection argument was not extensively discussed in the briefs, and there simply wasn’t time to adequately explore its basis in prior case-law or its ramifications for the future.

110. See McConnell, *supra* note 106, at 103–04.

111. See the detailed analyses in Stephen G. Calabresi, *A Political Question*, in Ackerman, *supra* note 100, at 136–37; Richard A. Epstein, “*In Such Manner as the*

ist, would agree with this assessment, since the distinction between “interpreting law” and “making law” is basic to an originalist understanding of law.<sup>112</sup>

We turn finally to the most heavily criticized aspect of the majority decision in *Bush v. Gore*: the remedy. Did the Court err in vacating the Florida Supreme Court’s statewide recounting plan rather than remand the case so that the Florida court could develop a recount procedure that accords with equal protection?

The legal issues are complex, turning mainly on whether the Court was correct to treat the December 12 safe harbor date as a hard deadline, as the Florida Supreme Court repeatedly seemed to declare. Why defer to the Florida court’s supposedly authoritative exposition of state law in this regard but not in so many others?<sup>113</sup> Wasn’t it more reasonable, and more consistent with comity and federalism and judicial restraint, to regard the Florida court’s statements on the December 12 deadline as conditioned on the assumption that a fair and complete recount could be accomplished by that date? Why impute to the Florida legislature an intention to meet the safe harbor deadline, regardless of the fairness or accuracy of the result?

This is certainly a reasonable argument, but an equally strong argument can also be given on the other side. Justice Scalia has himself made clear why he believes the U.S. Supreme Court was right to hear the case and right to decide it as it did. After noting that seven of the Justices agreed on the equal-protection argument, he remarked:

The only point on which we were in disagreement, the only point on which we were five to four, was whether having waited something like three weeks and looking like idiots—the greatest democracy in the world can’t run an election, you know? And we couldn’t have a transition team in Washington to take over from—should we give the Florida Court another two weeks to straighten it all out. That was the only point on which we disagreed, and five of them said no, enough is enough, let’s put an end to it, uh it’s improper and can’t be counted. And that was the case, not a hard case and not all those who were in the four were Democrats. And to fully appreciate the case you have to read the opinion of the Florida Supreme Court. There was indeed a politically motivated Court involved in this, but it wasn’t mine.<sup>114</sup>

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*Legislature Thereof May Direct*”: *The Outcome in Bush v. Gore Defended*, in Sunstein & Epstein, *supra* note 106, at 19–35; McConnell, *supra* note 106, at 108–11.

112. See, e.g., Scalia & Garner, *supra* note 38; *Interpretation*, *supra* note 40, at 25.

113. See, e.g., Jed Rubenfeld, *Not as Bad as Plessy. Worse*,” in Ackerman, *supra* note 100, at 22–26.

114. Antonin Scalia, Address at the University of Fribourg (March 8, 2006), *quoted in Murphy*, *supra* note 1, at 278.

It is clear from these remarks that Justice Scalia was concerned primarily with two issues: (1) putting an end to the “improper” recounting procedures ordered by a “politically motivated” court, and (2) policy issues such as ensuring an orderly transition and not “looking like idiots” in the eyes of the world. As Murphy notes, Scalia was furious at what he considered the openly partisan behavior of the seven-member Florida Supreme Court, each of whom had been appointed by a Democratic governor, and the insubordination they had displayed in continuing to rely upon a vacated order and refusing the Court’s directive for clarification.<sup>115</sup> As he saw it, the Florida court had engaged in multiple Article II violations. Even if the Court could be trusted to deal fairly, competently, and expeditiously with the multifaceted<sup>116</sup> equal-protection issues—which Scalia clearly doubted—this would not address the more fundamental Article II problems. The whole thing, in his eyes, was an unholy mess. Rather than have a politically motivated—and in his view untethered—state court plunge the nation into a drawn-out constitutional crisis, Scalia decided with his four conservative colleagues “to put an end to it.” And so it proved. The controversy quickly faded, and a peaceful and orderly transition of power occurred in the most powerful nation on earth.

Was this the most defensible legal solution? Perhaps so, perhaps not. But it is grossly unfair to charge Scalia, as Murphy does, with vulgar political partisanship and personal ambition. It was a judgment call, made under pressure, in extraordinary circumstances. Although few things in *Bush v. Gore* could have been predicted in advance, opting to end the recount was consistent with Justice Scalia’s core jurisprudential values of order, stability, certainty, and opposition to judicial lawmaking. As such, it reflects a deeper consistency that may not be readily apparent in the details.

To sum up my argument thus far: Murphy’s charge of blatant inconsistency in Scalia’s constitutional decision making cannot be sustained. On the contrary, as Ralph Rossum remarks, his record during the nearly three decades he has served on the Supreme Court has been “remarkably consistent.”<sup>117</sup>

As noted earlier, Scalia admits that his opinions have not been *perfectly* consistent. Scalia has denounced the “slander” that his method of legal interpretation “is a device calculated to produce socially or politically con-

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115. Murphy, *supra* note 1, at 269–70.

116. As Laurence Tribe notes, there was no simple set of instructions the Florida court could have issued that would have guaranteed that “arbitrary and disparate” treatment of voters did not occur. Tribe, *supra* note 109, at 43–56. Recently, Charley Wells, who served as Florida Chief Justice at the time of *Bush v. Gore*, has stated that the Court considered adopting uniform counting standards, but decided that this was properly a legislative prerogative and one that would require considerable input from election experts. CHARLEY WELLS, *INSIDE BUSH V. GORE* 73 (2013).

117. ROSSUM, *supra* note 42, at 218.

servative outcomes.”<sup>118</sup> His approach, he says, will “sometimes produce ‘conservative’ outcomes, sometimes ‘liberal’ ones.”<sup>119</sup> This is true—to a degree. But there are features of Scalia’s approach to constitutional adjudication that are clearly based on his conservative political values and preclude any sharp separation of law and politics.

First, consider Scalia’s textualism, understood as a general theory that applies to both statutory and constitutional interpretation. As Richard Posner argues, textualism is not a politically neutral theory; it tilts conservative because it systematically frustrates legislative intentions and purposes, thus tending in the direction of small government.<sup>120</sup> Moreover, Posner notes textualism tends to produce “perverse” literalistic readings of legal texts that create hostility toward courts and legislatures, which also tilts in the direction of small government.<sup>121</sup>

Second, Scalia’s constitutional originalism has built-in conservative values. Just as conservatism valorizes past values and resists change, so too does originalism. Both are backward-looking in orientation. Scalia’s particular brand of originalism, which largely collapses the distinction between original meaning and original expected applications, intensifies this backward-looking focus. Scalia’s inclusion of a highly selective (and generally conservative) list of “canons of construction” in his originalist theory adds to this hard-wired conservative slant.

There are also points of wiggle-room within Scalia’s general theory of legal interpretation—the so-called “fair reading method”<sup>122</sup>—that leave space for the injection of a judge’s personal and political values. Often, historical research will yield no clear conclusion about original meaning. Determining the “objectified intent” of a hypothetical reasonable reader will frequently involve contestable historical and theoretical judgments about how to “sum” various understandings and expectations into a single, coherent semantic “import.”<sup>123</sup> Ascertaining the intended level of generality or specificity of a constitutional provision may be difficult.<sup>124</sup> Determining which constitutional texts were intended to have “a certain evolutionary content” is highly debatable. Finally, room for freewheeling abounds in Scalia’s treatment of precedent. When should precedent trump original meaning? When is law “settled”? When has justifiable “reliance” oc-

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118. Scalia & Garner, *supra* note 38, at 16.

119. *Id.*

120. Posner, *supra* note 33.

121. *Id.*

122. Scalia & Garner, *supra* note 38, at 33–41.

123. See Gregory Bassham & Ian Oakley, *The New Textualism: The Potholes Ahead*, 28 *RATIO JURIS* 127 (2015).

124. See Robert W. Bennett, *Originalism and the Living American Constitution*, in ROBERT W. BENNETT & LAWRENCE B. SOLUM, *CONSTITUTIONAL ORIGINALISM: A DEBATE* 108–14 (2011).



curred? When are two cases relevantly alike? If precedents are to be preserved but modified in ways that better align them with original meaning, how should such modifications be determined? And so on.

My point here is twofold: (1) Scalia cannot plausibly claim that his interpretive method is politically neutral; the needle definitely points conservative, and (2) given the amount of discretion the method includes, it should come as no surprise if Scalia's personal and political values sometimes influence his judicial decisions. Haven't we all been taught by the legal realists, critics, postmodernists, and feminists that perfect objectivity is not a thing of this world?<sup>125</sup> It would defy common sense to suppose that judges are clothed in judicial hazmat suits, hermetically sealed from any political pathogens. Scalia, being human and a man of strong convictions, can claim no special exemption.

This brings us back to where we began: to Murphy's charge that Scalia is a hypocrite. Scalia, while endlessly denouncing "judicial activists," is "just as activist"<sup>126</sup> as his liberal colleagues, Murphy claims. Is this claim true?

The phrase "judicial activist" is often a term of abuse, meaning little more than "a judge whose views I disagree with." When used in a more neutral or descriptive way, it generally refers to a judge who frequently does one or more of the following: (a) strikes down the actions of the political branches (particularly when the alleged constitutional violation isn't clear); (b) fails to respect judicial precedent; or (c) engages in "judicial lawmaking" by giving a legal text a meaning it cannot fairly bear.<sup>127</sup> Is Scalia an "activist" in any of these three senses?

He clearly is an activist in senses (a) and (b). As an originalist, he frequently sees conflicts between *contemporary values* (reflected in legislation) and the *framers' values* (enshrined in the Constitution). So he is willing to strike down acts of the political branches (both legislative and executive) more frequently than are his liberal, nonoriginalist colleagues.<sup>128</sup>

Scalia is also clearly an activist in sense (b). Although he is more deferential to precedent than his originalist colleague, Justice Thomas, he is less

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125. Indeed, they may have taught us too well. For a powerful defense of objectivity in legal reasoning, see KENT GREENWALT, *LAW AND OBJECTIVITY* (1992).

126. Murphy, *supra* note 1, at 339.

127. Cf. CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* 42–43 (2005) (identifying judicial activism with either (a) or (b)). Defining judicial activism solely in terms of (a) and (b) is tendentious, because it fails to consider what conservatives see as the critical issue: judges who inappropriately read their own values into law.

128. See generally THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY* (2004); Thomas Miles, *The Real Judicial Activists*, *THE AMERICAN PROSPECT* (Dec. 17, 2006), <http://prospect.org/article/real-judicial-activists>.

so than most Supreme Court Justices.<sup>129</sup> This isn't surprising given his view that original meaning is the touchstone of correct constitutional interpretation. As he sees it, nonoriginalist precedent should thus be accepted grudgingly, if at all.

The crucial—and disputed—question is whether Scalia is an activist in sense (c). Does he regularly engage in judicial lawmaking by reading laws in ways that reflect his own values rather than any fair reading of the text?

I have argued that the charge commonly made by liberals, and by Murphy, that Scalia is an activist in sense (c) is not borne out by a close examination of Scalia's judicial record. While, not surprisingly, a certain amount of conscious or unconscious politically-driven decision making may have occurred, Scalia's overall record is decidedly both consistent and non-activist. In this respect, perhaps he has been a "Court of one."

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129. See David A. Strauss, *Tradition, Precedent and Justice Scalia*, 12 *CARD. L. REV.* 1699, 1699–70 (1991).



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