BE A FOX:
What a University General Counsel Should Learn from William A. Kaplin to Thrive in the Time of Trump

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INTRODUCTION

A fox knows many things, but the hedgehog knows one thing.[1]

This special issue of the *Journal of College and University Law* (JCUL) honors Professor William A. Kaplin ("Bill"), who was the intellectual architect of higher education law.[2] At a time few institutions had an in-house general counsel,[3] Bill had a simple, but profound insight—virtually every aspect of the law applies differently in higher education than it does outside of academe.[4] In other words, the unique

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1 The quote comes from a fragment attributed to the ancient Greek poet Archilochus (c. 680-c. 645 B.C) which was the inspiration for Isaiah Berlin's THE HEDGEHOG AND THE FOX: AN ESSAY ON TOLSTOY'S VIEW OF HISTORY (1953). James McPherson asserted that Abraham Lincoln was a hedgehog in his essay, *The Hedgehog and the Foxes*, in JAMES M. MCPHERSON, ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION 113 (1991).

2 Bill taught at the Catholic University of America's Columbus School of Law for more than forty years. *Remembering Professor Emeritus William Kaplin*, CATH. UNIV. COLUMBUS SCH. L. (November 5, 2024) https://www.law.edu/news-and-events/2024/11/2024-1105-Kaplin.html [hereinafter *Remembering Professor Emeritus William Kaplin*].

3 Louis H. Guard & Joyce P. Jacobson, ALL THE CAMPUS LAWYERS: LITIGATION, REGULATION, AND THE NEW ERA OF HIGHER EDUCATION 219-21 (2024). Having an in-house counsel is a relatively new development. One of my mentors, Brian A. Snow, became the first General Counsel for Colorado State University in 1989. Although the University of Kentucky had designated a lawyer as "General Counsel" back in the 1970s, the attorney maintained an extensive private practice in addition to his duties for the University. It was not until 1994, following the advocate's sudden death, that the University hired a full-time in-house counsel. Other large state universities have a similar experience.

4 The judiciary was beginning to treat higher education differently. For example, in *Regents of the*

circumstances of a campus lead to outcomes that are subtly, if not dramatically, different.[5] Bill's insight was inspiration for his treatise,[6] which became the "bible"[7] for higher education practitioners.[8] By systematically cataloging how the law was different when applied to campus, he ensured that every attorney—both in-house and external—recognized academia's unique environment. His treatise details why and how constitutional law, employment law, contracts, tax, intellectual property, and, in some instances, even civil litigation are subtlety different in the higher education context. Unlike the scholars who developed the fields of federal courts,[9] law & economics,[10] or critical race theory,[11] all of whom advocated a different analytical framework, Bill demonstrated that when colleges or universities were involved, there are unique considerations and, often, different outcomes.[12]

Bill's contributions extend far beyond his treatise. In an era when law reviews rarely published scholarly articles with a higher education orientation, Bill was an early editor of JCUL. At a time when there was no serious discussion of the intersection of the law and policy in higher education,[13] Bill played a major role in the development of Stetson University's Center for Excellence in Higher Education Law and Policy and the annual National Conference for Law & Higher Education.[14]

University of California v. Bakke, Justice Powell, in a portion of his opinion that was not joined by any other Justice, suggested that colleges and universities may consider race as one factor in the admission process as a means of obtaining the educational benefits of a diverse student body. 438 U.S. 265 (1978). Outside of higher education, consideration of race was limited to remedying the present-day effects of past intentional discrimination by the governmental entity.

5 *See* William E. Thro, *No Angels in Academe: Ending the Constitutional Deference to Public Higher Education*, 5 Belmont L. Rev. 27 (2018) (discussing equal protection, religious liberty, and due process outcomes in higher education).

6 William A. Kaplin, The Law of Higher Education (1st ed. 1978). Judge D. Brock Hornby, in a review in these pages, called it "the best treatment I have seen of the internal legal structure of colleges and universities, moving logically into liability questions." D. Brock Hornby, *Book Review*, 7 J.C. & U.L. 181, 183-84 (1980) (reviewing Kaplin's first edition of the treatise).

7 Martin Michaelson, *Review of William A. Kaplin and Barbara A. Lee's The Law of Higher Education*, 33 J.C. & U.L. 583, 584 (2006) (reviewing the fourth edition of the treatise).

8 The second edition of his treatise appeared in 1985. Barbara Lee joined him as a co-author for the third edition in 1995. The fourth edition appeared in 2006 and the fifth edition in 2013. The sixth edition, which included Neal Hutchens and Jacob Rooksby as co-authors, arrived in 2019. The seventh edition, which is smaller than the previous two volume set, appeared in 2024.

9 *See generally* Henry M. Hart, Jr. & Herbert Weschler, The Federal Courts and the Federal System (1st ed. 1953).

10 Richard Posner, Economic Analysis of the Law (1972); *The Problem of Social Cost*, 3 J. L. & Econ. 1 (1960).

11 Derek A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518 (1980).

12 The closest analogy to Bill's work is the recognition that state supreme courts were relying on state constitutional provisions to reach results different from those in the federal courts. *See* A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 Va. L. Rev. 873 (1976); William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977).

13 Indeed, the only real discussion of how the law operated on campus was confined to lawyers attending at the National Association of College & University annual conferences.

14 During this annual conference, Stetson University presents an award named after Bill to someone

Bill's teaching focus was the "field of constitutional law, and in particular, those parts of the field concerning constitutional analysis and decision making,"[15] and he also was the founder of Catholic University's Law & Public Policy Program.[16] However, his legal scholarship was largely confined[17] to writing and then updating his monumental treatise.[18]

Yet, for all his significant accomplishments as a scholar, teacher, journal editor, academic center director, or conference founder, Bill's greatest legacy is the lesson that every university general counsel should, and indeed must, learn from him.[19] That lesson comes not from something he explicitly said or wrote, but by inference from his treatise, the scope of articles published in JCUL, and the myriad of topics discussed and debated at the center and conference he helped to establish. Bill's treatise demonstrates that almost every aspect of the law applies differently on campus, and the university general counsel *must know something about all facets of the law*.[20] Because JCUL is publishing articles on a variety of topics from a higher education perspective, the institution's chief legal officer should be familiar with those subjects. If centers and conferences are exploring how legal principles influence and inform educational policy, then the higher education general counsel must also understand the connection. Bill's lesson for a university general counsel is simple—be a Fox, not a Hedgehog.

This article examines the complex implications of the university general counsel being a Fox, counsel who knows many things, rather than a Hedgehog, counsel who knows one thing. First, it explains the importance, if not necessity, of a university general counsel being a Fox. This was particularly true when institutions first began to hire.[21] Second, it illustrates why a large contemporary university

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who has made significant contributions to law and higher education policy scholarship. Previous winners include Barbara Lee, Neal Hutchens, and Jacob Rooksby, all of whom were co-authors on subsequent editions of his treatise, as well as such giants in the field of higher education law as Judith Areen, Jay Dolmage, Amy Gajda, Gordon Gee, Oren Griffin, Richard Kahlenberg, Peter Lake, Michael Olivas, Robert O'Neil, Gary Pavela, Laura Rothstein, Patricia Salkin, and Leland Ware. It was one of the greatest honors of my life when I received the Kaplin Award at this conference from Bill himself in 2014.

15 William A. Kaplin, *Problem Solving and Storytelling in Constitutional Law Courses Constitutional Law: Themes for the Constitution's Third Century, by Daniel A. Farber, William N. Eskridge, Jr., and Philip P. Frickey. St. Paul, Minnesota: West Publishing*, 21 Seattle U. L. Rev. 885, 885 (1998).

16 *Remembering Professor Emeritus William Kaplin*, *supra* note 2.

17 Kaplin, *supra* note 15 (Bill's book review for *Seattle University Law Review*); William A. Kaplin, *A Typology and Critique of Title IX Sexual Harassment Law After Gebser and Davis*, 26 J.C. & U.L. 615 (2000) (Bill's article in JCUL).

18 *See* list of subsequent editions, *supra* note 8.

19 While the lesson is applicable to all university general counsel, it is particularly applicable to those who work at large state universities or private institutions with significant national presence.

20 *See, e.g.*, William E. Thro & Charles J. Russo, The Constitution on Campus: A Guide to Liberty and Equality in Public Higher Education (2022) (discussing the ramifications of federal constitutional law as applied to college campuses).

21 Guard & Jacobson, *supra* note 3, at 221 (documenting the growth in the number of members of the National Association of College & University Attorneys). Interestingly, when I became an Assistant Attorney General in Virginia in late 1997, Christopher Newport University, the College

needs a variety of Hedgehogs in the office of general counsel but must still have a Fox as the university general counsel. Third and most importantly, it explores the seven new paradigms that characterize the Time of Trump. These seven new paradigms demand new innovative solutions. Only a Fox, albeit one supported by numerous Hedgehogs, can guide higher education administrators through these turbulent times.

I. THE UNIVERSITY GENERAL COUNSEL MUST BE A FOX

The university general counsel, the person who serves as chief legal officer of the institution, must be a Fox. An expertise in constitutional law, employment law, corporate law, intellectual property, or civil litigation might make one a distinguished professor or a well-respected senior partner in a large law firm, but it does not make one an excellent general counsel for an institution of higher education.[22] Instead, to be an excellent general counsel for a college or university, one must have basic knowledge about almost every facet of law.[23] A higher education general counsel must be able to focus on the entire forest, rather than just one clump of trees. In other words, general counsel in this context must be able to focus on all the issues confronting the institution instead of a discrete set of issues that, while important, impact only a small part of the institution. The institution's general counsel must have a rudimentary understanding of virtually every legal issue.

Foundationally, all corporate in-house general counsel must be generalists, but it is particularly important for the higher education general counsel to be a Fox.[24] This is so for two reasons. First, the typical corporation focuses on one or two business activities, but institutions of higher education engage in a diverse range of different activities. The corporate general counsel knows many things about one big thing, the corporation's major activity. In contrast, the higher education general counsel must know many things about many things. For example, the general counsel of a health system knows about all aspects of healthcare, but has no reason to know about providing education, operating an apartment complex, running a chain of restaurants, or directing a professional sports team. Conversely, if the institution is a large research institution with an integrated health system and Power 4 athletics program, the chief legal officer must know many things about teaching undergraduates and graduates, student housing, dining services,

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of William & Mary, Longwood University, Norfolk State University, the University of Mary Washington, Virginia Military Institute, and Virginia State University did not have in-house legal counsel. Rather, each of those institutions was represented by a lawyer in the Education Section of the Virginia Attorney General's Office.

22 This does not mean that a general counsel cannot be an expert in one or more fields. For example, much of my scholarship, appellate advocacy, and teaching experience has focused on constitutional issues. However, as general counsel of a public land-grant university with an integrated health system and a Power 4 athletics program, I must be a Fox.

23 Guard & Jacobson, *supra* note 3, at 223.

24 Although there are significant differences between a private corporation and a large university, there are similarities. Indeed, some universities have revenues that are greater than corporations in the Fortune 500.

law enforcement, research administration, health care delivery, academic freedom, shared governance, and an athletic program that is analogous to the NBA or NFL.[25] In many States, the flagship public land-grant institution is the largest employer, the largest landlord, largest restaurant in terms of meals served, largest health care system, and the largest land owner. Indeed, if large universities were stand-alone communities, they would often be the size of small cities with 50,000 or more people on any given day.[26] Their annual budgets are often in the billions of dollars.

Second, as Bill taught us, higher education is different and higher education law reflects those differences. Consider the almost universal institutional practice of tenure. Except for the federal judiciary, higher education is the only part of American society where an individual can achieve a lifetime appointment, often at a six-figure salary, and maintain it for decades despite clear declines in productivity or demand for their classes. Although the private sector and military immediately terminate those who fail to meet performance standards for promotion, higher education gives a grace year to those who fail to achieve tenure. In other words, after telling someone that their performance is inadequate and their services are not needed, institutions continue to employ them in the same role for another year.

Similarly, consider higher education's practice of shared governance which allows faculty, who cannot be removed by the Board, to decide policy decisions or make recommendations that are often rubber stamped by administrators or boards.[27] A good leader will *always* seek input from a diversity of persons and viewpoints before deciding, but a good leader will *never* let a narrowly focused group actually make a decision. Certainly, faculty have expertise in their fields and that expertise should receive significant deference in curriculum matters, but being the leading expert on a particular subject does not qualify one to make decisions on the complex issues facing the university. There was a time when even state flagship institutions were small enterprises which could be run in a collaborative manner. With universities becoming multi-billion-dollar enterprises that are highly regulated by the state and federal governments, those days are long gone.

Moreover, there are laws that apply to higher education, but do not apply to other segments of society. For example, one could be an employment lawyer for years and be an expert on Title VII but be completely unaware of Title VI or Title IX. However, a university general counsel will need to know how Title VI applies to admissions and scholarships[28] and how Title IX applies to athletics and sexual

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25 Moreover, for private institutions subject to the National Labor Relations Act and for public institutions where the State has permitted collective bargaining among public university employees, the university general counsel must be familiar with labor relations.

26 Not surprisingly, they have their own police forces, who are often better trained than the local police force. Moreover, because there are unique challenges in policing a community with a substantial number of young adults, university police officers must be even better than their non-higher education counterparts.

27 Furthermore, in the case of public institutions, faculty are public employees who are not accountable to elected officials.

28 *See generally* Students for Fair Admissions v. President & Fellows of Harv. Coll., 600 U.S. 181 (2023).

assault.[29] The private sector does not worry about the federal or state constitutions, freedom of information acts, open meetings statutes, or public procurement codes, but the chief legal officer will have to grapple with these restrictions on a daily basis.

II. IN THE TWENTY-FIRST CENTURY, THE FOX NEEDS HEDGEHOGS

This Article focuses on the university general counsel or chief legal officer and *not* on those numerous attorneys who work in an office of the general counsel at a college or university and who regularly provide legal advice to the institution's administrators.[30] The reason for this narrow focus is simple: there is a fundamental difference between the role of higher education general counsel and the role of their subordinates. While attorneys within an office of general counsel certainly provide advice on what the law requires or prohibits, provide counsel on the development of policy, and seek to be problem solvers within the confines of the law,[31] more often than not, these individuals concentrate on a narrow, discrete area of the law such as health care, business transactions, employment law, student affairs, athletics, or intellectual property. They focus on a tree or a clump of trees rather than the whole forest. In a sense, they are not higher education lawyers, but lawyers with a particular area of expertise who work at a college or a university. With their narrow expertise, they are very much Hedgehogs—they know one thing well. [32]

For large universities in the third decade of the twenty-first century, the presence of Hedgehogs is essential. A public flagship land-grant institution with an integrated medical center and a Power 4 Conference athletics program likely will have tens of thousands of students (and almost as many employees), receive several hundred million dollars in research funding, provide health care to much of the State, develop numerous patents, and conduct sporting events that resemble NFL or NBA games. The institution must comply with a myriad of laws and regulations including

29 In the half century since its enactment, Title IX has become particularly complex. *See generally* Elizabeth Kaufer Busch & William E. Thro, Title IX: The Transformation of Sex Discrimination In Education (2018).

30 Similarly, in addition to faculty members, a college or university may employ persons who have a law degree, but who never actually represent the institution. Examples include Title IX coordinators, compliance officers, and those who develop commercial applications of intellectual property.

31 As I have said many times, including on the website of the University of Kentucky's Office of Legal Counsel, a lawyer who represents an institution of higher education has three roles. First, the lawyer is an "attorney" who tells the institutional administrators what the law requires and what it prohibits. The lawyer can never tell an administrator to fail to do what is required or do what is prohibited. Second, the lawyer is "counselor" who offers advice on the policy choices facing the institution. In the space between what the law prohibits and what it requires, an institution always acts legally or constitutionally, but that does not mean that the policy choice is wise. Third, the lawyer is a "problem solver" who seeks to find a way to achieve the institution's objectives within the parameters of the law. Often, there will be legal barriers that prevent the institution's objective from being achieved directly or in the manner originally contemplated, but a creative lawyer may be able to find a way to achieve the objective indirectly or in a different manner.

When a lawyer gives both legal and policy advice, the lawyer must be clear which is legal, and which is policy. It is a disservice to the institution to pretend that the lawyer's policy advice is an instruction as to what is legally prohibited or required.

32 Of course, many Hedgehogs join a general counsel's office and eventually acquire a broad expertise and become Foxes who go on to serve as university general counsel.

discrimination laws for both students and employees, health care compliance, research misconduct, immigration, export controls for national security purposes, and NCAA and College Sports Commission. Without the attorneys who focus on narrow areas of the law, the institution cannot function.

Moreover, as Martin Michaelson noted in his review of the fourth edition of Bill's treatise in 2007, there was "interminable thunderstorm of law—represented by the more than three-fold expansion of this treatise—that has poured down on higher education institutions in the past quarter century."[33] In the nearly two decades since Michaelson wrote those words, his "thunderstorm of law" has become a flash flood. For example, since 2007, higher education attorneys have dealt with the Title IX Dear Colleague Letter,[34] the ensuing litigation over due process in sexual assault cases,[35] the challenges to racial preferences in higher education,[36] the end of the NCAA's amateurism model,[37] and, of course, the challenges of Covid. [38] This does not include special challenges presented in the Time of Trump, as discussed below.

Yet, the complex legal realities of the contemporary university do not diminish the need for the chief legal officer to be a Fox. While the university general counsel in the year 2025 may spend more time managing the Hedgehogs than practicing law, it is still essential that the Fox is focused on the institution as a whole rather than a particular division or department. If the Fox is wise, the Fox will listen to the Hedgehogs' recommendations and seriously consider their advice. Still, it is the Fox, not some consensus of the Hedgehogs, who must make the determination as to what legal advice to give the President or Chancellor.[39]

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33 Michaelson, *supra* note 7, at 584.

34 *See* Rosyln Ali, *Dear Colleague Letter: Sexual Violence* (Apr. 4, 2011). In 2014, the Office of Civil Rights issued additional guidance. *See* Catherine E. Lhamon, *Questions and Answers on Title IX and Sexual Violence* (Apr. 24, 2014). Proposed regulations pursuant to the Violence Against Women Act were issued June 20, 2014, and final regulations were issued on October 20, 2014. Violence Against Women Act, 34 C.F.R. § 668 (2014).

35 *See* Samantha Harris & KC Johnson, *Campus Courts in Court: The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications*, 22 N.Y.U. J. L. & Pub. Pol'y, 49 (2019). For a discussion of the constitutional obligations to both the complainant and the respondent, *see* William E. Thro, *No Clash of Constitutional Values: Respecting Freedom & Equality in Public University Sexual Assault Cases*, 28 Regent U. L. Rev. 197 (2016).

36 *See* Students for Fair Admissions v. Fellows of Harv. Coll., 600 U.S. 181; Fisher v. Univ. of Tex., 579 U.S. 365 (2016) (*Fisher II*); Fisher v. Univ. of Tex., 570 U.S. 297 (2013) (*Fisher I*).

37 Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69 (2021).

38 During the Covid pandemic, institutions had to figure out how to protect the campus community, continue to provide instruction, maintain all non-instructional operations, and, ultimately, remain financially viable, but there was an expectation that things would eventually return to the pre-Covid norms. While the Covid pandemic still echoes, particularly in terms of educational delays and our general acceptance of virtual meetings, normalcy generally has returned. That expectation does not apply to the Time of Trump. Instead, there is a sense that things will change fundamentally. While things might swing back from certain extremes, the pre-2025 status quo is not likely.

39 Although there is a tendency to find some reasonable compromise in the middle, a middle ground can often be wrong. We often forget that Solomon did not split the baby but used the suggestion to reach the correct choice. *See 1 Kings* 3:16-28 (telling the story of King Solomon settling a dispute involving custody of a child by offering to split the child in two).

Moreover, as institutions have become more complex, the role of the university general counsel has evolved. There was a time, particularly in the days before in-house counsel became common, when lawyers were not involved in decision-making, but simply engaged after a decision had been made. The attorney's job was to fit a decision that had already been made into the confines of what the law requires and what it prohibits. Today, the general counsel's role is more of a strategic partner for the institution.[40] The institution's senior leader will be part of the President or Chancellor's cabinet and play an active role in providing policy advice before the decision is made.

III. A FOX IS ESSENTIAL IN THE TIME OF TRUMP

When institutions decided that they needed an in-house counsel in the last decades of the twentieth century, the natural response was to hire a Fox or perhaps a Fox and a few younger Foxes to staff a small general counsel's office.[41] As higher education became more regulated and there was a need for more specialists, the university general counsel offices had to hire Hedgehogs. The model was a Fox serves as chief legal officer and supervises a group of Hedgehogs. Until recently, it seemed that this model would continue to be the norm. Then, everything changed—America entered the Time of Trump. The Time of Trump poses unprecedented and, in some instances, existential challenges for higher education.[42] The Time of Trump does not just represent a new paradigm—it represents *seven* new paradigms.

Many of these seven new paradigms are a direct result of the forty-seventh President, but others are the result of Supreme Court decisions, the transformation of intercollegiate athletics over the last four years, and a broad-based loss of confidence in higher education. To fully understand the implications of these paradigms and why a Fox as university general counsel is a necessity, one must briefly explore each of these paradigms.

First, the Supreme Court's decision in *Students for Fair Admissions v. President & Fellows of Harvard College*[43] removes race as a factor in higher education decision-making.[44] To explain, *any* consideration of race—even if designed to help racial

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40 Guard & Jacobson, *supra* note 3, at 197-202.

41 *Id.* at 224-25.

42 I litigated cases on behalf of higher education institutions from 1991 to 2000, served as in-house counsel at a public liberal arts university from 2000 to 2004 and again from 2008 to 2012, and as chief legal officer of a public land-grant research institution with an integrated medical center from 2012 to the present. From my perspective, the first months of the second Trump Administration were, by far, the most challenging.

43 600 U.S. 181 (2023).

44 Because the Equal Protection Clause and Title VI are co-extensive, *Students for Fair Admissions* is applicable to both public institutions and private institutions that receive federal funds. 600 U.S. 181 (2023); Gratz v. Bollinger, 539 U.S. 244, 276 n. 23 (2003).

minorities[45]—is subject to strict scrutiny.[46] To survive strict scrutiny, the institution must articulate a compelling governmental interest.[47] Historically, the Court has recognized three compelling governmental interests: (1) remedying the present-day effects of past intentional discrimination by the institution;[48] (2) in higher education, obtaining the educational benefits of a diverse student body; [49] and (3) preventing prison riots.[50] Just as significantly, the Supreme Court has explicitly rejected many other proposed compelling governmental interests, including remedying past societal discrimination;[51] maintaining racial balance;[52] correcting underrepresentation of minorities;[53] providing faculty role models for students;[54] increasing the number of physicians in underserved areas;[55] and making "the

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45 "[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." Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 n. 9 (1982). As the Supreme Court declared, "the mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight. Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice." City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989). "Therefore, the Court has "insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications, such as race-conscious university admissions or hiring 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).

As Justice Thomas explained, the fact "these programs may be motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part). From a constitutional standpoint, "it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged." *Id.* In other words, "the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution." *Id.*

46 Adarand Constructors, Inc. v. Pena, 515 U.S. at 227; City of Richmond v. J.A. Croson Co., 488 U.S. at 505 (recognizing that "racial characteristics so seldom provide a relevant basis for disparate treatment" and racial classifications "are constitutional only if they are narrowly tailored to further compelling governmental interests."). Grutter v. Bollinger, 539 U.S. 306, 326 (2003). This is a very demanding standard, which few programs can survive. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007). As Chief Justice Roberts observed, "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Id.* at 748 (Roberts, C.J., joined by Scalia, Thomas, & Alito, JJ., announcing the judgment of the Court).

47 601 U.S. at 206-07.

48 *City of Richmond*, 488 U.S. at 504-05.

49 Grutter v. Bolinger, 539 U.S. at 328-30.

50 Johnson v. California, 543 U.S at 512-13.

51 Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 551 U.S. at 731.

52 *Id.*; Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986).

53 488 U.S. at 507 (quoting Sheet Metal Workers v. EEOC, 478 U.S. 421, 494 (1986) (O'Connor, J., concurring in part and dissenting in part).

54 *Grutter*, 539 U.S. at 323-24; Wygant v. Jackson Bd. Educ., 476 U.S. at 267; Regents of the Univ. of Cal. v. Bakke, 438 U.S. at 307-10.

55 *Regents of the Univ. of Cal.*, 438 U.S. at 310-11.

objective of supplier diversity a reality."[56] Because most higher education institutions do not have present day effects of past intentional racial discrimination, they have relied on diversity.[57] Moreover, while the Court recognized diversity *only* in the context of a student body, college and universities extended the diversity rationale to faculty and staff hiring and even procurement.[58] Although the Court had rejected underrepresentation as a compelling governmental interest,[59] institutions frequently focused on the underrepresentation of women and minorities.[60]

Yet, in *Students for Fair Admissions* the Court emphatically rejected diversity as a compelling governmental interest.[61] Consequently, the sole justification for considering race in decisions regarding admissions, scholarships, faculty and staff hiring, and procurement disappeared. As most institutions cannot rely on present day effects of past racial discrimination by the institutions, higher education may not consider race. Moreover, by explicitly holding that federal anti-discrimination laws apply to individuals rather than groups, and that litigation procedures are the same for everyone, *Ames v. Ohio Department of Youth Services* reinforced *Students for Fair Admissions*.[62]

Second and relatedly, the Trump Administration has relied on *Students for Fair Admissions* to justify an aggressive campaign to change the culture of higher education.[63] After the murder of George Floyd, universities rushed to issue statements

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56 488 U.S. at 505-506.

57 Past discrimination is not enough to justify race-based decision making. Rather, there must still be present day effects of that discrimination. For example, the fact a university did not admit African Americans until the 1970s does not necessarily mean there are present day effects of that discrimination in the 2020s. Similarly, the fact one university engaged in intentional discrimination and there are lingering effects of this unconstitutional conduct does not justify the use of race by another institution.

58 The Supreme Court has never held "an 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 aggregation of students" is a compelling governmental interest. 438 U.S. at 315. "A university is not permitted to define diversity as 'some specified percentage of a particular group merely because of its race or ethnic origin.'" Fisher v. Univ. of Tex., 570 U.S. at 311. "That would amount to outright racial balancing, which is patently unconstitutional." 539 U.S, at 330. "Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'" *Parents Involved in Cmty. Schs.*, 551 U.S. at 732.

59 488 U.S. at 507.

60 For example, higher education leaders rarely worried about the underrepresentation of men among nursing or elementary education majors.

61 600 U.S. at 214-15, 230.

62 Ames v. Ohio Dep't of Youth Servs., 605 U.S. 303 (2025).

63 *See* Pam Bondi, *Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination* (July 29, 2025) (available at https://www.justice.gov/ag/media/1409486/dl?inline=&utm_medium=email&utm_source=gov delivery); Craig Trainor, U.S. Department of Education, Office for Civil, Right, *Dear Colleague Letter: Title VI of the Civil Rights Act in Light of Students for Fair Admissions v. Harvard*, (Feb. 14, 2025) (available at https://www.ed.gov/media/document/dear-colleague-letter-sffa-v-harvard-109506.pdf); U.S. Department of Education, Office for Civil Rights, *Frequently Asked Questions About Racial References and Stereotypes under Title VI of the Civil Rights Act* (Feb. 28, 2025) [hereinafter *Frequently Asked Questions*] (available at https://

of solidarity and to embrace programs[64] promoting an ideology[65] that Yaschia Mounk calls the "identity synthesis."[66] Yet, after the October 7 Massacre in Israel, many university presidents remained silent or muted[67] as their campuses engaged in increasingly threatening activity, including calling for genocide of the Jewish population, bombarding Jewish students in university buildings,[68] or turning campuses into pro-Palestinian encampments.[69]

The President has responded to these developments by seeking to end so-called Diversity, Equity & Inclusion or "DEI"[70] programs. Although the Department of Education's guidance documents[71] have been enjoined in the courts,[72] the Administration continues to utilize the same broad interpretations of the Equal Protection Clause and Title VI theories.[73] Similarly, the Executive Branch has insisted that Title IX's prohibition on sex discrimination does not extend to gender identity.[74] Moreover, it has taken actions to ensure that transgender women do not play women's sports,[75] and initiated litigation against States that permit transgender women to play in women's sports at the high school level.[76]

Third and relatedly, the Executive Branch has sought to remake federal funding of research. Perhaps most significantly for higher education budgets in the long term, the agencies have tried to reduce the administrative overhead rate paid on federal grants.[77] Historically, institutions have received an administrative overhead

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www.ed.gov/media/document/frequently-asked-questions-about-racial-preferences-and-stereotypes-under-title-vi-of-civil-rights-act-109530.pdf).

A federal trial court enjoined the Department of Education from implanting or enforcing the *Dear Colleague Letter—Title VI* or the *Frequently Asked Questions*. *See* Nat'l Educ. Ass'n v. United States Dep't of Educ., 779 F. Supp. 3d 149 (D.N.H. 2025).

64 Elizabeth Kaufer Busch & William E. Thro, *The American Proposition on Campus: Academic Freedom and Academic Responsibility*, 49 J.C. & U.L. 143, 145 (2024).

65 *Id.*

66 Yascha Mounk, The Identity Trap 9 (2023) (describing a "body of ideas" that "draws on a broad variety of intellectual traditions and is centrally concerned with the role that identity categories like race, gender, and sexual orientation play in the world.").

67 Busch & Thro, *supra* note 64, at 146.

68 *Id*. at 146.

69 *Id.*

70 *See* Bondi, *supra* note 62; Exec. Order No. 14151, 90 C.F.R. § 8339 (Jan. 20, 2025) ("Ending Radical and Wasteful Government DEI Programs and Preferencing").

71 *See* Trainor, *supra* note 62*; Frequently Asked Questions*, *supra* note 62.

72 *See Nat'l Educ. Ass'n*, 779 F. Supp. 3d 149.

73 *See* Bondi, *supra* note 62.

74 Exec. Order No. 14168, 90 C.F.R. § 8615 (Jan. 20, 2025) ("Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government").

75 Exec. Order No. 14201, 90 C.F.R. § 9279 (Feb. 5, 2025) ("Keeping Men Out of Women's Sports").

76 United States v. Cal. Interscholastic Fed'n, No. 8:25-cv-1485 (C.D. Cal 2025).

77 Ailia Zehra, *NIH Cuts Overhead Fundings for Research*, The Hill (Feb 8, 2025) (available at https://thehill.com/policy/healthcare/5134501-nih-cuts-billions-from-research-overhead-funding/).

rate in excess of fifty percent, but the agencies intend to lower that rate to fifteen percent.[78] While federal trial courts have blocked these measures,[79] higher education associations have offered a compromise that is still substantially below what institutions received before 2025.[80] Moreover, to the extent that previous grants conflict with the President Trump's priorities, agencies have attempted to cancel grants.[81] The courts have blocked these efforts,[82] but, in the long term, grants may be simply denied or the new regulations may permit cancelations.[83]

Fourth, President Trump has embraced the theory of the unitary executive.[84] Defying long-standing tradition, he has fired members of the National Labor Relations Board and other independent agencies,[85] significantly restructured the Department of Education without congressional approval,[86] and enforced the federal statute[87] prohibiting in-state tuition for persons who are not lawfully present.[88] While the lower federal courts often enjoined these initiatives, the Supreme Court—at least so far—has allowed them to proceed.[89] Most significantly, the Court has curtailed the ability of federal trial courts to enter universal injunctions.[90]

Fifth and conversely, in a development that may slow the President's initiatives and those of future administrations, the Supreme Court has declared that the views of the Executive Branch concerning the meaning of statutes and regulations shall no longer receive judicial deference. To explain, the Constitution assumes that the final "interpretation of the laws" would be "the proper and peculiar province of the courts,"[91] but, in *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*,

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78 *See* 2 C.F.R. § 200.402.

79 Ass'n of Am. Univs. v. Nat'l Sci. Found., WL 1725857 (D. Mass. 2025); Massachusetts v. Nat'l Insts. of Health, 770 F. Supp.3d 277 (D. Mass. 2025).

80 *See Summary of Executive Orders*, COGR, https://www.cogr.edu/cogr-summary-executive-orders (last visited Oct. 9, 2025).

81 *See Tracking Trumps Higher Education Agenda Government Applies Ideological Standards for Research and Scholars*, Chron. Higher Educ. (2025) (available at https://www.chronicle.com/article/tracking-trumps-higher-ed-agenda).

82 Am. Pub. Health Ass'n v. Nat'l Inst. for Health, 2025 WL 1822487 (D. Mass. 2025).

83 *See HHS Suggests It Will Provide Less Notice and Opportunity for Grant and Contract Rules*, Crowell (March 3, 2025) (available at https://www.crowell.com/en/insights/client-alerts/hhs-suggests-it-will-provide-less-notice-and-opportunity-for-comment-on-grant-and-contract-rules).

84 *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L. J. 541, 597 (1994).

85 *See* Trump v. Wilcox, 145 S. Ct. 1415 (2025).

86 McMahon v. New York, 139 F.4th 63 (1st Cir. 2025) *cert. pending motion to stay*, 145 S. Ct. 2643 (2025).

87 8 U.S.C. § 1623(a).

88 United States v. Walz, 0:25-cv-2668 (D. Minn. 2025); United States v. Beshear, No. 3:25-cv-026 (E.D. Ky. 2025); United States v. Texas, No. 7:25-CV-55 (N.D. Tex. 2025).

89 *See* McMahon v. New York, 139 F.4th 63; Trump v. CASA, Inc., 606 U.S. 831 (2025); Off. of Pers. Mgmt. v. Am. Fed'n of Gov't Emps., 145 S. Ct. 1914 (2025); Trump v. Wilcox, 145 S. Ct. 1415; Dep't of Educ. v. California, 145 S. Ct. 966 (2025).

90 *See* Trump v. CASA, Inc., 606 U.S. 831.

91 The Federalist No. 78 (Alexander Hamilton). When a statute is ambiguous, the judiciary applies

the Court created an exception to the principles.[92] Under *Chevron* deference, if a statute administered by the Executive Branch was ambiguous, the judiciary must defer to any reasonable interpretation of the Executive Branch.[93]

Last year, in *Loper Bright Enterprises v. Raimondo*, the Court overruled *Chevron*.[94] As the Court observed, "*Chevron*'s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do."[95] *Chevron's* grave error was to assume "the inquiry is fundamentally different just because an administrative interpretation is in play. The very point of the traditional tools of statutory construction—the tools courts use every day—is to resolve statutory ambiguities."[96] Moreover, because properly promulgated regulations have the force and effect of a statute,[97] *Loper Bright* is equally applicable to an agency's interpretation of a regulation.[98]

For higher education, the consequences are clear—it is much easier to successfully challenge the often novel and expansive interpretations of the Executive Branch.[99]

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various canons of statutory interpretation. Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (2012). But the judicial interpretation is binding on both the legislative and executive branches. Stern v. Marshall, 564 U.S. 462, 484 (2011). While "the longstanding practice of the government—like any other interpretive aid—can inform [a court's] determination of 'what the law is," the interpretation of the meaning of statutes, as "applied to justiciable controversies," is "exclusively a judicial function." NLRB v. Noel Canning, 573 U.S. 513, 525 (2014) (internal quotation marks omitted); United States v. American Trucking Ass'ns, Inc., 310 U.S. 534, 544, (1940).

92 467 U.S. 837 (1984).

93 *Id.*; Loper Bright Enters. v. Raimondo, 603 U.S. 369, 337 (2024) ("*Chevron* rested on 'a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'") (internal citations omitted). It did not matter that the agency's interpretation was not the best interpretation, it simply mattered whether the agency's interpretation was reasonable. *See* Raymond M. Kethledge, *Hayek and the Rule of Law: Implications for Unenumerated Rights and the Administrative State*, 12 N.Y.U. J. L. & Liberty, 193, 213 (2020); 907 Whitehead Street, Inc. v. Secretary of Agriculture, 701 F.3d 1345, 1350 (11th Cir. 2012). Indeed, courts deferred to the agency's interpretation even when the agency *changed* its interpretation. Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981-82 (2005).

94 Loper Bright Enters. v. Raimondo, 603 U.S. at 400.

95 *Id*.

96 *Id.* Indeed, the Supreme Court recently said courts "are not obligated to accept administrative guidance that conflicts with the statutory language it purports to implement." City & Cnty. of San Francisco, Cal. v. Env't Prot. Agency, 145 S. Ct. 704, 720 (2025). Thus, it is the courts—not an executive agency—that should say what the law is. While an agency's views are entitled to "respect," the same is true of "any litigant's reasoning." Dayton Power & Light Co. v. Fed. Energy Regul. Comm'n, 126 F.4th 1107, 1136 (Nalbandian, J., concurring). The Court's "job is to interpret statues and exercise independent judgment." *Id*. at 1138.

97 Chrysler Corp. v. Brown, 441 U.S. 281, 295-96 (1979).

98 Before *Loper Bright*, the Court curtailed deference to agency interpretations of regulations. 603 U.S. at 400; Kisor v. Wilkie, 588 U.S. 558 (2019).

99 For example, many aspects of Title IX, including the three-part test for athletics, the requirement to adjudicate sexual assault claims between students, and the idea that Title IX applies to gender identity, are the result of guidance documents. Those interpretations no longer receive deference.

For example, the Trump Administration has taken an extraordinarily broad view of Title VI, Title VII, and Title IX.[100] Prior to *Loper Bright*, the judiciary would defer to those interpretations of the statutes, even though the federal government is stretching precedents.[101] After *Loper Bright*, federal officials must convince the judiciary that their interpretation is the best interpretation.[102] Instead of the unquestioning acceptance that higher education once applied to pronouncements from the U.S. Department of Education, institutions must be skeptical of any novel interpretation from any administration. [103]

Sixth, the Supreme Court's decision in *National Collegiate Athletic Association v. Alston*,[104] which prompted the lawsuit and settlement in *House v. NCAA*,[105] led to a transformation of college athletics. Student-athletes, who once received tuition, room, board, and cost of attendance and could transfer only if they sat out a year, now can receive a portion of a school's athletics revenues, pursue additional funds for their name, image, and likeness, and enjoy effective "unlimited free agency" with respect to transferring. Moreover, litigation regarding the implementation of the *House* settlement on antitrust and Title IX grounds seems inevitable. Congress is considering legislation[106] and President Trump has issued an executive order.[107] The only certainty regarding the future of intercollegiate athletics is that the realities of 2030 will be fundamentally different from the realities in 2025.

Seventh, there is a loss of confidence in higher education.[108] As Elizabeth Busch

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Elizabeth Kaufer Busch & William E. Thro, *Aligning Title IX with the American Proposition: The Implications of the Supreme Court's Limitations on Executive Power*, 427 Educ. L. Rep. 1 (2024); Elizabeth Kaufer Busch & William E. Thro, *Restoring Title IX's Constitutional Integrity,* 33 Marq. Sports L. Rev. 507 (2022).

100 *See* Bondi, *supra* note 63.

101 *Compare Students for Fair Admissions*, 601 U.S. at 230 ("nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration or otherwise), *with* Bondi, *supra* note 63, at 5 ("A federal funding program requires applicants to describe 'obstacles they have overcome' or submit a 'diversity statement' in a manner that advantages those experiences intrinsically tied to protected characteristics, using the narrative as a proxy for advantaging that protected characteristic in providing benefits.").

102 603 U.S. 369 at 400.

103 For example, during the Obama Administration, the federal government interpreted Title IX as requiring colleges and universities to set up a parallel justice system to deal with alleged sexual assaults. *See* Ali, *supra* note 34; Universities immediately set about hiring Title IX coordinators and setting up such a system. However, as Elizabeth Busch and I have argued, the Obama Administration's interpretation was dubious. *See* Elizabeth Kaufer Busch & William E. Thro, *Restoring Title IX's Constitutional Integrity,* 33 Marquette Sports L. Rev. 507 (2022); Busch & Thro, *Title IX: Transformation, supra* note 29.

104 594 U.S. 69 (2021).

105 In re: Coll. Athlete NIL Litig., 2025 WL 1675820 (N.D. Cal. 2025) (slip copy) (appeal filed).

106 H.R. 4312, 119th Cong. (2025-26).

107 Exec. Order No. 14322, 90 C.F.R. § 35281 (July 24, 2025) ("Saving College Sports").

108 For public institutions, this loss of confidence means more state legislative scrutiny. This has taken the form of bans on DEI, changes to governance structure, and increased regulation and accountability measures. Busch & Thro, *supra* note 64, at 145-46.

and I previously demonstrated in these pages,[109] there is an increased awareness that higher education has failed to cultivate a campus culture conducive to the pursuit of knowledge and the preservation of our Constitutional Republic.[110] Our institutions of higher learning have abandoned the search for truth to promote the prevailing popular opinion of the day and have failed to promulgate the legally required constitutional practices.[111] In other words, the Nation's colleges and universities increasingly fail to protect academic freedom of individuals by not equipping students, faculty, and staff with the skills to practice what John Inazu calls "confident pluralism."[112]

In the Time of Trump, every university general counsel must deal with all aspects of these new paradigms. The general counsel must tell the institution that, after *Students for Fair Admissions*, race cannot be a consideration and must develop new "race-neutral" strategies to achieve the institution's objectives. The chief legal officer must cope with the Trump Administration's aggressive efforts to transform higher education, retrench federal research funding, and test the limits of the unitary executive. The top attorney must adjust to a time when—for better or worse—there is no deference to a federal agency's interpretations and the only certainty in athletics is uncertainty. Looming over all these challenges is the public's sense that higher education has failed.

With the new paradigm of the Time of Trump, colleges and universities need a Fox as general counsel. The Hedgehogs are as essential as they ever have been, but the chief legal officer must have a basic knowledge about constitutional law, administrative law, antitrust, immigration, research financing, and seemingly dozens of other subjects. Moreover, while the university counsel will continue to tell administrators what the law requires and prohibits, and will provide policy advice, their primary focus is problem-solving. The new paradigm requires innovative solutions. Indeed, those institutions that fail to develop novel solutions might not survive. Those that develop the fresh solutions are likely to thrive.

IV. CONCLUSION

A half-century ago, Bill Kaplin had a eureka moment. He realized that the law applied differently in the higher education context. Special considerations applied when giving advice to an institution or its officers. That was the inspiration for his treatise and formed the basis for the lesson that every general counsel should

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109 *Id.*

110 Johns Hopkins University President Ronald Daniels has suggested that universities have a broad obligation to democratic society. Specifically, institutions must (1) promote access, mobility, and fairness; (2) educate students to participate in democracy; (3) create knowledge to check power; and (4) encourage dialogue among people with different perspectives, values, backgrounds, and experiences. Ronald J. Daniels, What Universities Owe Democracies (2021).

111 Instead, some faculty, administrators and students already assume they know answers to life's most difficult questions and lack tolerance for those who fail to recognize the "correct" momentary viewpoint.

112 *See generally* John D. Inazu, Confident Pluralism: Surviving And Thriving Through Deep Difference (2016).

learn—be a Fox who knows many things, not a Hedgehog who knows one big thing.

That lesson was especially applicable to those early in-house general counsels who were often solo or maybe had an assistant or two. It was equally applicable, albeit in a different way, as college and universities became more complex, and it was necessary to hire Hedgehogs who knew one big thing. If one is going to supervise a group of attorneys who have expertise in a variety of fields, one needs to have a basic knowledge of each of those fields. Now, in the Time of Trump, the lesson is essential. The new paradigms bring new challenges. If an institution is going to thrive or even just survive among all the legal, political, and financial uncertainties, it is essential that its general counsel is a Fox who knows many things. As he looks down from Heaven, Bill surely agrees.