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Dear Reader,

Thank you for your patronage. The TEXAS JOURNAL ON CIVIL LIBERTIES & CIVIL RIGHTS was founded in 1992 at the University of Texas School of Law. The Journal has since evolved into one of the premiere civil rights journals in the country.

The Journal is published twice a year with support from the Individual Rights and Responsibilities Section of the State Bar of Texas and private donors. The Journal is run by law students and is overseen by a Board of Advisors.

In addition to publishing biannually, the Journal hosts an annual symposium featuring civil rights scholars from around the nation. This year's symposium was entitled "Civil Rights on the Border." The Journal also hosts speeches, brown bag events, and other events to expose students to this important area of law.

The Journal received national attention this semester when retired Justice John Paul Stevens quoted Ivan Bodensteiner's Article in a speech at the Equal Justice Initiative Dinner on May 4. Professor Bodensteiner's Article was published in Vol. 16.1.

In this Volume, we are pleased to publish two Articles from nationally recognized legal scholars and two Notes from our own fantastic editorial staff. The first Article discusses the Court's need to adopt a separate standard for evaluating the First Amendment right of expressive association. The second Article argues that the disparate impact theory of discrimination is not unconstitutional. The first Note argues against using physical restraint and seclusion on students with disabilities. The second Note warns of the problems of using the term "critical mass" in affirmative-action cases.

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ARTICLES

NOTES

Articles

Amending *Christian Legal Society v. Martinez*: Protecting Expressive Association as an Independent Right in a Limited Public Forum

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Abstract

With limited acknowledgment of its dramatically different approach to expressive association, the Supreme Court in Christian Legal Society v. Martinez *upheld a public university's policy requiring all student organizations to give voting membership to all interested students, even if a student's beliefs conflicted with the expressive purpose of the organization. In concluding that this "all-comers" policy was both reasonable and viewpoint neutral, the Court analyzed a student organization's First Amendment expressive-association claim using the test for speech restrictions on government property constituting a limited public forum. This Article argues that the Court's merging of protections for speech and expressive association in a limited public forum is inadequate to protect associational rights that lie at the core of the First Amendment. After an introduction, Part II highlights the Court's prior expressive-association cases; Part III explores the ways in which* Martinez *departed from the approach of these cases; Part IV argues that the viewpoint neutrality test governing restrictions affecting speech in a limited public forum does not translate well as a means to safeguard associational rights, and proposes new tests for analyzing expressive association in a limited public forum; Part V contends that in a limited public forum expressive association should protect an organization's right to select members on the basis of voluntarily selected beliefs or conduct, but not based on immutable characteristics or status. This Article explores this status/belief distinction and addresses two opposing yet compelling criticisms of the distinction—that it does not sufficiently protect minority groups from discrimination, and, that it does not sufficiently protect expressive association.*

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I. INTRODUCTION

At first blush, the holding in *Christian Legal Society v. Martinez*[1]—that a public university may require its student groups to accept all students as voting members, eligible to run for leadership positions, without running afoul of the First Amendment—seems unremarkable.[2] After all, as the Supreme Court held, a policy that applies equally to all student organizations is "paradigmatically viewpoint neutral."[3] Moreover, the University of California, Hastings College of the Law's

[1] Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971 (2010).

[2] *See id.* Public universities, established by the state and at least partially supported by state taxes, must comply with the federal Constitution. *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 822 (1995) ("The University of Virginia, an instrumentality of the Commonwealth for which it is named [is] thus bound by the First and Fourteenth Amendments[.]").

[3] *Martinez*, 130 S. Ct. at 2987 n.15.

("Hastings") desire to teach tolerance and foster communication among students with differing viewpoints seems like a laudable reason for creating an "all-comers policy."[4]

However, the reasoning employed by the majority in *Martinez* drastically altered the framework for analyzing expressive-association cases. First, and most importantly, the Court merged the expressive-association claim of the Christian Legal Society ("CLS") student organization with its speech claim, essentially negating independent protection for CLS's right to expressive association. The Court assessed the group's speech and expressive-association claims using the forum analysis applicable to cases involving speech restrictions on government property.[5] The Court held that a burden on a student organization's expressive association is constitutionally permissible if it is viewpoint neutral and reasonable in light of the purposes of the forum, using the test for speech claims in a limited public forum.[6] In doing so, the Court failed to appreciate that expressive association contains both speech and conduct elements that cannot be adequately safeguarded by applying the test applicable to speech rights alone.

Further, in analyzing whether Hastings's policy was reasonable, the Court gave Hastings added deference in defining its academic mission because the university provided student organizations with financial support and facilities.[7] The Court noted that CLS's ability to select members on the basis of belief would be constitutionally protected in society at large, but not when a university is lending the organization its

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[4] *Id.* at 2990 (noting that "the Law School reasonably adheres to the view that an all-comers policy, to the extent it brings together individuals with diverse backgrounds and beliefs, 'encourages tolerance, cooperation, and learning among students.'"). *But see* Alan E. Brownstein and Vikram D. Amar, *Reviewing Associational Freedom Claims in a Limited Public Forum: An Extension of the Distinction between Debate Dampening and Debate Distorting State Action*, 38 HASTINGS CONST. L.Q. 505, 510 (2011) ("Does a policy that allows any group, formed around any set of ideas or activities, to exist—but also requires each such group to take all persons, even those who may vehemently disagree with those ideas or activities—make a lot of sense?").

[5] *Martinez*, 130 S. Ct. at 2975. Forum analysis determines the character of a forum affected by law in order to determine the free speech protections that attach. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 797 (1985) (holding that, before determining whether a speech regulation is permissible, the Court "must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic."). There are four major types of forums—the public forum, the designated public forum, the limited public forum, and the nonpublic forum—and different speech protections attach to each. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–47 (1983) (describing the different forums). The public forum designation, which attaches to places like parks or streets that "by long tradition or by government fiat have been devoted to assembly and debate," receives the highest First Amendment scrutiny. *Id.* at 45. Speech restrictions that occur in a limited public forum, the designation that attaches to student organizations, are constitutional if they are viewpoint neutral and reasonable in light of the purposes of the forum. *See Rosenberger*, 515 U.S. at 829 ("Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum,' nor may it discriminate against speech on the basis of its viewpoint." (citation omitted)).

[6] *Martinez*, 130 S. Ct. at 2988.

[7] *See* Brownstein & Amar, *supra* note 4, at 510 (arguing that the Court was "truly deferential" in its application of the limited public forum test in *Martinez*).

facilities.[8] For the first time, the Court imported the concept of "subsidies" into a case involving student organizations, affording Hastings unprecedented latitude in its treatment of student organizations.

Finally, in reaching its conclusion, the Court erased the distinction—critical to expressive-association analysis—between invidious discrimination based on status or immutable characteristics and discrimination based on chosen beliefs and conduct.[9] This distinction is critical because although there is usually little to no expressive value in discrimination motivated by animus and made on the basis of race, gender, sexual orientation, or the religion into which an individual is born, an organization's ability to select members based on commonly held beliefs central to the group's purpose is fundamental to the right of expressive association.

This Article argues that student organizations' right to expressive association at a public university must be preserved, even though student organizations operate within a limited public forum.[10] One way to safeguard expressive association in a limited public forum would be to apply a test that is slightly more deferential to the government than the "strict scrutiny" test applied to burdens on expressive association in society at large.[11] Another alternative is to modify the definition of viewpoint neutrality that applies in the speech context: Instead of simply assessing whether a university policy is viewpoint neutral from a speech perspective (i.e., whether it unconstitutionally targets certain viewpoints), courts must also examine whether a policy targets groups wishing to include or exclude those with a specific viewpoint.

The Article further explores how recognition of the distinction between status and belief or conduct should be imported into the conception of viewpoint neutrality when analyzing expressive-association cases in a limited public forum. Protecting a group's ability to select members based on ideology, but not on status, is a coherent way to distinguish constitutionally protected association from unprotected discrimination in a limited public forum.

The Article begins in Part II with a discussion of the Supreme Court's prior expressive-association cases that focuses on the Court's prior treatment of the status/belief distinction. Part III discusses the ways

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[8] *Martinez*, 130 S. Ct. at 2978 ("The First Amendment shields CLS against state prohibition of the organization's expressive activity, however exclusionary that activity may be. But CLS enjoys no constitutional right to state subvention of its selectivity.").

[9] *Id.* at 2990 (rejecting CLS's argument that "it does not exclude individuals because of sexual orientation, but rather 'on the basis of a conjunction of conduct and the belief that the conduct is not wrong'" (citation omitted)).

[10] *Martinez*'s merging of speech and expressive conduct was largely motivated by the context in which the case took place—Hastings's all-comers policy affected the "limited public forum" of student organizations. *See id.* at 2984–86. A limited public forum exists when the government opens up its property for the discussion of limited subjects, or to limited speakers. *See Rosenberger*, 515 U.S. at 829 ("The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.").

[11] *See infra* Part IV.B.

in which *Martinez* departed from the approach of these cases. Part IV argues that the majority's merging of free speech and expressive-association claims in a limited public forum, although possessing some appeal, is ultimately wrongheaded in the context of expressive association, and proposes amended tests to govern expressive association. Part V argues that, contrary to the majority opinion in *Martinez*, expressive association should protect the right to discriminate based on conduct or belief, but not on status. This Article explores the distinction between status and belief, and addresses two compelling criticisms against it—that it does not sufficiently protect minority groups from discrimination, and, on the other hand, that it does not sufficiently protect expressive association.

II. EXPRESSIVE ASSOCIATION AND COMPETING VALUES

According to the Supreme Court, "[w]hile the freedom of association is not explicitly set out in the [First] Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition."[12] The right to form associations is fundamental to the important value of self-governance, which animates the First Amendment; indeed, one scholar has argued that "assembly, petition, and association are at least as central to the process of self-governance as is free speech and that assembly and petition were historically viewed as more fundamental to a politically functional society than speech."[13] This is because of the important role associations have played in the creation and promotion of values and in the fomentation of political change.[14]

The Supreme Court's freedom of association cases focus on three distinct but interrelated themes: the right of the individual to join an organization,[15] the intersection of freedom of association and the political process,[16] and the rights of the organization as an autonomous entity.[17]

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[12] Healy v. James, 408 U.S. 169, 181 (1972).

[13] Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 981 (2011).

[14] *See generally id.*

[15] *See, e.g.*, Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 88 (1982) (holding that state cannot impose public disclosure laws to require political party to disclose list of those receiving campaign disbursements); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 451 (1958) (deeming it unconstitutional for state to compel the NAACP to disclose its membership list). These cases protect the individual's ability to join an unpopular organization without fear of "threats, harassment, and reprisals" but also protect the organization as an entity, as disclosure requirements can "cripple a minor party's ability to operate effectively[.]" *Brown*, 459 U.S. at 97, 98.

[16] *See, e.g.*, Clingman v. Beaver, 544 U.S. 581 (2005) (holding that state law mandating "semi-closed" primaries, where registered members of one party could not vote in another party's primary, did not severely burden associational rights); Tashjian v. Republican Party, 479 U.S. 208 (1986) (invalidating state law requiring "closed primaries," prohibiting independents from voting in a party's primary); Democratic Party of U.S. v. Wisconsin *ex rel.* LaFollette, 450 U.S. 107 (1981) (invalidating state law compelling the Democratic Party to permit anyone to vote in its primary elections).

[17] *See generally* Daniel A. Farber, *Speaking in the First Person Plural: Expressive Associations and*

The Supreme Court's cases dealing with the autonomy of an organization are usually classified under the right to "expressive association," which safeguards group members' ability to associate with each other in order to engage in protected expression.[18] This includes a group's right to include members and its right to deny membership to individuals an association wishes to exclude.[19] The ability to join voices to engage in collective speech not only facilitates expression, but also permits minority views to flourish despite "majoritarian demands for consensus."[20]

The difficult expressive-association cases often pit a group's right to associate for expressive purposes against important social values like equality and open democracy. Until *Martinez*, the Court balanced First Amendment rights with these values by ensuring that a group's purpose was truly expressive and by distinguishing between status and belief.

A. The Early Cases

Perhaps because the Constitution does not explicitly enumerate freedom of association, the exact origins of the right are murky.[21] However, most scholars agree that the specific right to expressive association was first articulated in *Roberts v. United States Jaycees*.[22]

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the First Amendment, 85 MINN. L. REV. 1483 (2001) (charting the progression of the freedom of association doctrine).

[18] *See id.* at 1504 (explaining that expressive association allows individuals to "join forces and communicate more effectively than they could separately . . . . People in a group can encourage each other's activities; to the extent that their expression is aimed at each other instead of outsiders, they may value the expression more because it is shared by other group members.").

[19] *See* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2985 (2010) ("'Freedom of association,' we have recognized, 'plainly presupposes a freedom not to associate.'" (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984))).

[20] John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 CONN. L. REV. 149, 201–02 (2010) (arguing that the primary value of expressive association is that it "permits *dissent* to manifest through groups" (emphasis added)).

[21] *See* John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. 485, 485–89 (2010) (tracing the history of freedom of association and arguing that most scholars have overlooked the fact that "[t]he Supreme Court's foray into the constitutional right of association began . . . with *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)").

[22] *See, e.g.*, Barbara K. Bucholtz, *What Goes Around Comes Around: Legal Ironies in an Emergent Doctrine for Preserving Academic Freedom and the University Mission*, 13 TEX. WESLEYAN L. REV. 311, 336 n.131 (2007) (describing *Roberts* as the "seminal case that elaborated the current 'expressive association' doctrine"); Linda E. Fisher, *Guilt by Expressive Association: Political Profiling, Surveillance and the Privacy of Groups*, 46 ARIZ. L. REV. 621, 637 (2004) (explaining how the *Roberts* Court "subdivided the right [of association] into two related but distinct components: expressive association—the right to associate to engage in protected First Amendment expression—and intimate association—the right to associate to pursue private relationships"); Shawn M. Larson, *For Blacks Only: The Associational Freedoms of Private Minority Clubs*, 49 CASE W. RES. L. REV. 359, 366 (1999) ("The *Roberts* Court, in an opinion by Justice Brennan, established the framework for interpreting the freedom of association as being composed of two separate elements: the 'freedom of intimate association and [the] freedom of expressive association.'" (quoting *Roberts*, 468 U.S. at 618)).

In *Roberts v. United States Jaycees*,[23] the Supreme Court addressed "a conflict between a State's efforts to eliminate gender-based discrimination against its citizens and the constitutional freedom of association asserted by members of a private organization."[24] More directly, the Court addressed a conflict between the national United States Jaycees organization, whose bylaws permitted women to join only as non-voting "associate members," and local Minnesota Jaycees chapters, who wanted to admit women as full voting members.[25] Wishing to revoke the local chapters' charters, the national organization brought a declaratory judgment action to invalidate portions of the Minnesota Human Rights Act, which prohibited denying "any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex."[26] The Jaycees, a young men's private social and civic organization, was subject to this public accommodations law[27] because it offered goods and services and "solicit[ed] and recruit[ed] dues-paying members based on unselective criteria."[28]

The Supreme Court, with Justice Brennan writing for the majority, ultimately upheld this law against two strands of freedom of association—freedom of "intimate association," which preserves close, intimate relationships upon which "individuals draw much of their emotional enrichment[,]"[29] and the "right to associate for expressive purposes[.]"[30] Justice Brennan described freedom of expressive association, implicated by the Minnesota law, as necessary to safeguard the other freedoms expressly enumerated in the First Amendment:

> An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. According protection to collective effort on behalf of shared goals is especially

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[23] 468 U.S. 609 (1984).

[24] *Id.* at 612.

[25] *Id.* at 612–14.

[26] *Id.* at 614–15 (quoting MINN. STAT. § 363.03, subd. 3 (1982) (current version at MINN. STAT. ANN. § 363A.11 (West 2003))).

[27] For a deeper understanding of the history of public accommodations laws, see Andrea R. Scott, *State Public Accommodation Laws, the Freedom of Expressive Association, and the Inadequacy of the Balancing Test Utilized in* Boy Scouts of America v. Dale, 120 S. Ct. 2446 (2000), 24 HAMLINE L. REV. 131, 145–46 (2000), and see generally Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996).

[28] *Roberts*, 468 U.S. at 613–14, 616 (citation omitted).

[29] *Id.* at 618–19. According to the Court, "[f]amily relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Id.* at 619–20.

[30] *Id.* at 623.

> important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority. Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.[31]

The Court then acknowledged that requiring the Jaycees to accept women as full voting members effectuated a great "intrusion into the internal structure or affairs of an association . . . . [that] may impair the ability of the original members to express only those views that brought them together."[32] However, the Court upheld the Minnesota law because it was "justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[33] Eliminating gender discrimination and ensuring equal access to goods and services constituted a compelling state interest that was achieved through means that did not "impose[] any serious burdens on the male members' freedom of expressive association."[34]

By stating that admission of women as full members would not undermine the Jaycees's ability to express its message, the Court took a first step towards drawing a line between a group's desire to exclude members based on status (or immutable characteristics) and a group's ability to select its membership based on chosen beliefs or conduct. According to the Court, the Minnesota law "requires no change in the Jaycees' creed of promoting the interests of young men, and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members."[35] Presumably, then, the Jaycees could exclude women who opposed the group's philosophy of promoting the interests of only young men, but the Jaycees was not permitted to assume that women, based on their immutable characteristics, hold views that conflict with the organization's purposes.[36]

In addition to distinguishing between status and belief, *Roberts* also took steps to erase the distinction between laws that penalize the exercise of associative rights and laws that simply deprive a group of benefits. According to *Roberts*, expressive association is implicated by laws that "impose penalties or withhold benefits from individuals because of their

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[31] *Id.* at 622 (citation omitted).
[32] *Id.* at 623.
[33] *Roberts*, 468 U.S. at 623.
[34] *Id.* at 626.
[35] *Id.* at 627.
[36] *Id.* at 628 ("In the absence of a showing far more substantial than that attempted by the Jaycees, we decline to indulge in the sexual stereotyping that underlies appellee's contention that, by allowing women to vote, application of the Minnesota Act will change the content or impact of the organization's speech.").

membership in a disfavored group[.]"[37] For this proposition, the *Roberts* Court cited the earlier case of *Healy v. James*,[38] perhaps the closest analogue to *Martinez* in the Court's First Amendment jurisprudence.

In *Healy*, the Supreme Court held that the denial of recognition to the student organization Students for a Democratic Society ("SDS") violated the associational rights guaranteed by the First Amendment because recognition conferred the ability upon SDS to use campus facilities and bulletin boards.[39] The Court in *Healy* noted that it must strike a balance between "the mutual interest of students, faculty members, and administrators in an environment free from disruptive interference with the educational process" and "the equally significant interest in the widest latitude for free expression and debate consonant with the maintenance of order."[40] The Court began its legal analysis by repudiating the notion that "because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."[41] These protections included "the right of individuals to associate to further their personal beliefs."[42]

The case arose when students at Central Connecticut State College applied to form a local chapter of SDS to discuss left-leaning politics and serve as "an agency for integrating thought with action so as to bring about constructive changes."[43] SDS chapters at other colleges had been responsible for instigating civil disobedience and violence, but the college's president had no evidence that this local chapter would use violent tactics.[44] The Supreme Court concluded that because this denial of recognition abridged the First Amendment as a prior restraint, "the burden was upon the College administration to justify its decision of rejection."[45] According to the Court, "[t]he College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent."[46]

In rendering its decision, the Supreme Court overturned the lower courts' judgment that denial of recognition did not infringe upon SDS's associational rights. The district court and the court of appeals had held that non-recognition "abridged no constitutional rights" because the group could still meet to express its views outside of campus.[47] Thus, according to the lower courts, SDS had been denied only the "college's

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[37] *Id.* at 622.
[38] 408 U.S. 169 (1972).
[39] *Id.* at 181–82.
[40] *Id.* at 171.
[41] *Id.* at 180 (finding that the "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools" (citation omitted) (internal quotation marks omitted)).
[42] *Id.* at 181.
[43] *Healy*, 408 U.S. at 172 (citation omitted) (internal quotation marks omitted).
[44] *Id.* at 171–73.
[45] *Id.* at 184.
[46] *Id.* at 187–88.
[47] *Id.* at 182.

stamp of approval."[48] The Supreme Court, however, concluded that "[t]here can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right. The primary impediment to free association flowing from nonrecognition is the denial of use of campus facilities for meetings and other appropriate purposes."[49] Using logic that would later be discarded by the majority in *Martinez*, Justice Powell, writing for the majority, held that "the group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the President's action."[50]

The *Healy* Court determined that the denial of the ability to use university facilities was an indirect burden on associational rights, even if an organization could organize itself outside of campus, because it amounted to the denial of benefits.[51] According to the Court, there were permissible and impermissible bases upon which to deny these benefits.[52] *Healy* and *Roberts* approached the denial of a benefit as the same type of burden on associational rights as a direct punishment—in stark contrast to the majority's analysis in *Martinez*.[53]

B. Solidifying the Status/Belief Distinction

Several of the Supreme Court's subsequent expressive-association cases solidified the principle that while the First Amendment protects an organization's ability to limit its membership to those who share its ideology, this protection usually does not include the right to exclude potential members based on their immutable characteristics or status.

In *New York State Club Ass'n v. City of New York*,[54] the Supreme Court confronted a New York public accommodations law that applied to private clubs with 400 or more members,[55] similar to the one upheld in *Roberts*.[56] A consortium of 125 private clubs challenged the facial

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[48] *Healy*, 408 U.S. at 181 (citation omitted) (internal quotation marks omitted).

[49] *Id.*

[50] *Id.* at 183. In *Martinez*, the Court held that Hastings's all-comers policy is "all the more creditworthy in view of the substantial alternative channels that remain open for [CLS-student] communication to take place." Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2991 (2010) (alternation in original) (citation omitted) (internal quotation marks omitted).

[51] *Healy*, 408 U.S. at 182–83.

[52] *Id.* at 185–86. An organization's viewpoint was an impermissible basis upon which to deny recognition, but a concrete and reasonable fear that the organization would engage in violent activity could justify a denial of recognition. *Id.* at 185–92.

[53] *See infra* Part IV.

[54] 487 U.S. 1 (1988).

[55] *Id.* at 6.

[56] The New York law made it "an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement [to withhold benefits from an individual] because of the race, creed, color, national origin or sex of [that] person[.]" *Id.* at 4 n.1 (internal quotation marks omitted)

validity of the law.[57]

In holding that the New York law was not substantially overbroad, the Court deemed it significant that there was not yet a record of enforcement of the law and the consortium "ha[d] not identified those clubs for whom the antidiscrimination provisions [would] impair their ability to associate together or to advocate public or private viewpoints."[58] Although the Court upheld the law, the majority opinion penned by Justice White went even further than *Roberts* in distinguishing status-based discrimination, which was not constitutionally protected, from discrimination on the basis of ideology or conduct:

> On its face, Local Law 63 does not affect "in any significant way" the ability of individuals to form associations that will advocate public or private viewpoints. It does not require the clubs "to abandon or alter" any activities that are protected by the First Amendment. If a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the Law erects no obstacle to this end. Instead, the Law merely prevents an association from using race, sex, and the other specified characteristics as shorthand measures in place of what the city considers to be more legitimate criteria for determining membership. It is conceivable, of course, that an association might be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion. In the case before us, however, it seems sensible enough to believe that many of the large clubs covered by the Law are not of this kind. We could hardly hold otherwise on the record before us, which contains no specific evidence on the characteristics of *any* club covered by the Law.[59]

The necessary implications of this passage are twofold. First, although the Court found no constitutional infirmity with the New York law, its analysis would have been different if the law forbade private clubs from "exclud[ing] individuals who do not share the views that the club's members wish to promote."[60] Second, the Court might have found that the law, as applied to a particular club, violated the First Amendment if the group would "not be able to advocate its desired viewpoints nearly as effectively if it [could not] confine its membership to those who share

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(quoting Local Law No. 97 of 1965, N.Y.C. ADMIN. CODE § 8-107(2) (1986)).

[57] *Id.* at 8, 11.

[58] *Id.* at 14.

[59] *N.Y. State Club Ass'n*, 487 U.S. at 13–14 (citation omitted).

[60] *Id.* at 13.

the same sex, for example[.]"[61] Thus, even status-based discrimination might be protected by the First Amendment if a group could show that it was critical to its expressive advocacy.

Seven years later, in another case resembling *Martinez*, the Supreme Court confronted the distinction between an organization's exclusion of gays and its right to reject a message that endorses gay rights.[62] In *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*,[63] the Court upheld the right of the South Boston Allied War Veterans Council, an association of veterans who received a permit from the City of Boston to organize the annual St. Patrick's Day parade, to exclude from participation an organization of gay, lesbian, and bisexual descendants of Irish immigrants who wished to express pride in both their Irish and their gay identities.[64] This organization, known as GLIB, sued the Council for denying its application to participate under Massachusetts law prohibiting discrimination in public accommodations.[65]

The Veterans Council had been given authority by the mayor in 1947 to conduct the parade, which drew up to one million spectators, and the city had for many years prior to the lawsuit allowed it to use its official seal, in addition to providing printing services and funding.[66] However, the lower courts had characterized the parade as purely private, and GLIB did not appeal this finding.[67]

Justice Souter's majority opinion began its legal analysis by categorizing the parade as protected expressive activity and GLIB's requested "participation as a unit in the parade [as] equally expressive."[68] The Court also found that the Massachusetts public accommodations law, with its "venerable history" of eradicating discrimination in public life,[69] did not generally violate the First Amendment, as it "[did] not, on its face, target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on the *act* of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds."[70] However, the Court could not countenance the law as applied to require the parade organizers to accept marchers with a particular message of gay pride and tolerance:

> In the case before us, however, the Massachusetts law has been applied in a peculiar way. . . . Petitioners disclaim any

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[61] *Id.*

[62] The status/belief distinction as applied to gays and lesbians is not entirely satisfying as a matter of legal logic or the realities of the gay experience. *See infra* Part V.B.

[63] 515 U.S. 557 (1995).

[64] *Id.* at 561, 581.

[65] *Id.* at 561–62.

[66] *Id.* at 560–61.

[67] *Id.* at 566.

[68] *Hurley*, 515 U.S. at 570.

[69] *Id.* at 571–72.

[70] *Id.* at 572 (emphasis added).

> intent to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march. Instead, the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner. Since every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade. Although the state courts spoke of the parade as a place of public accommodation, once the expressive character of both the parade and the marching GLIB contingent is understood, it becomes apparent that the state courts' application of the statute had the effect of declaring the sponsors' speech itself to be the public accommodation . . . . But this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.[71]

The Court thus found it significant that the Council was not seeking to exclude gays from marching in its parade. If that were the case, Massachusetts nondiscrimination law may have been constitutionally applied to prevent status-based discrimination.[72] However, applying nondiscrimination law to prevent the Council from discriminating on the basis of certain viewpoints meant turning the Council's speech (and not just its services) into a public accommodation—a result antithetical to the First Amendment.

In holding that Massachusetts could not apply its public accommodation law against the Council, the Court distinguished *New York State Club Ass'n* because, in that case, "although the association provided public benefits to which a State could ensure equal access . . . compelled access to the benefit, which was upheld, did not trespass on the organization's message itself."[73] In contrast, forcing the Council to accept GLIB into its parade would distort the Council's expression, even if the Council's message was not entirely coherent. According to the Court, "[r]ather like a composer, the Council selects the expressive units

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[71] *Id.* at 572–73 (citations omitted).

[72] There is a great deal of evidence that sexual orientation is at least partially based on immutable, biological factors. *See, e.g.*, Niklas Långström, Qazi Rahman, Eva Carlström & Paul Lichtenstein, *Genetic and Environmental Effects on Same-sex Sexual Behavior: A Population Study of Twins in Sweden*, 39 ARCHIVES SEXUAL BEHAV. 75 (2010); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994) (citing to evidence in scholarly and popular media substantiating the view that sexual orientation is immutable); Larry Gostin, *Genetic Discrimination: The Use of Genetically Based Diagnostic and Prognostic Tests by Employers and Insurers*, AM. J. L. & MED. 109, 119 (1991); *US Researchers Find Evidence That Homosexuality Linked to Genetics*, THE GUARDIAN, Dec. 1, 2008, *available at* http://www.guardian.co.uk/world/2008/dec/01/homosexuality-genetics-usa.

[73] *Hurley*, 515 U.S. at 580 (referring to N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 13 (1988)).

of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day."[74]

The Court in *Hurley* approached the issue of whether excluding people with certain views would dilute an organization's message with significant deference to the organization and its conception of its message.[75] Two of the Court's most recent expressive-association cases confront the issue of dilution of message and the status/belief distinction with more precision and detail and with differing results.

C. Expressive Association and the Dilution of a Group's Message

In *Boy Scouts of America v. Dale*,[76] the Supreme Court again addressed a state's application of its public accommodations law against an expressive-association challenge. This time, the Court reversed the New Jersey Supreme Court's interpretation of the state's public accommodations law, which prohibited "discrimination on the basis of sexual orientation in places of public accommodation."[77] According to the lower court, this law compelled the Boy Scouts of America, which "assert[ed] that homosexual conduct is inconsistent with the values it seeks to instill[,]" to accept James Dale, an exemplary Boy Scout whose adult membership was revoked after he was quoted in a newspaper discussing the need for gay teens to have active role models.[78]

The Supreme Court, with Chief Justice Rehnquist penning the majority opinion, held that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."[79] In order to foster a diversity of views and protect minority expression, laws that infringe upon this freedom are subject to strict scrutiny, where a law may survive scrutiny only if it is "adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[80]

The *Dale* majority found that the Boy Scouts engaged in

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[74] *Id.* at 574.

[75] *Id.* at 574–75. Although the Court was not certain as to why the Council wished to exclude GLIB, it held that "whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." *Id.* at 575.

[76] 530 U.S. 640 (2000).

[77] *Id.* at 645, 661.

[78] *Id.* at 644, 646.

[79] *Id.* at 648 (citation omitted).

[80] *Id.* (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984)).

expressive association because they sought to instill values through speech, and by example, in their members.[81] The Boy Scout mission statement explained that a Boy Scout should be "morally straight" and "do [his] duty to God and [his] country."[82] Nowhere in the Boy Scouts's mission statement was sexual orientation mentioned, but position statements promulgated by the Boy Scouts claimed that "homosexual conduct" is inconsistent with the Boy Scouts's mission.[83]

In holding that the Boy Scouts's expression would be altered by the forced inclusion of Dale, the Court focused on the fact that Dale is openly gay, and that the Boy Scouts are entitled to communicate certain messages through example, instead of directly addressing topics.[84] Chief Justice Rehnquist wrote:

> We must then determine whether Dale's presence as an assistant scoutmaster would significantly burden the Boy Scouts' desire to not "promote homosexual conduct as a legitimate form of behavior." As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression. That is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message. But here Dale, by his own admission, is one of a group of gay Scouts who have "become leaders in their community and are open and honest about their sexual orientation." Dale was the co-president of a gay and lesbian organization at college and remains a gay rights activist. Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.[85]

This portion of the Court's opinion is significant because, as Dale alleged, the Boy Scouts do accept *heterosexual* members who vocally oppose the Boy Scouts' policy on gay scout leaders.[86] Thus, the Court protected the right of the Boy Scouts to treat gays differently than heterosexuals, but only where prospective or current members from the LGBT[87] community also engaged in speech or conduct that would impair the Boy Scouts' mission. Going further than *Hurley*, which stressed that

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[81] *Dale*, 530 U.S. at 649–50.
[82] *Id.* at 649.
[83] *Id.* at 652.
[84] *Id.* at 655.
[85] *Id.* at 653 (citations omitted).
[86] *Dale*, 530 U.S. at 655.
[87] LGBT is an acronym that refers to the broader lesbian, gay, bisexual, and transgender community.

the parade organizers did not discriminate on the basis of gay status at all, the *Dale* Court relied on the fact that expressive association contains both speech and conduct elements, such that the mere presence of certain individuals may distort a group's message.[88]

As a result, the *Dale* majority refused to apply the more deferential test used in the free speech context for "expressive conduct" to the Boy Scouts' expressive-association claim.[89] In *United States v. O'Brien*, the Supreme Court had used an intermediate level of scrutiny to determine the constitutionality of a statute that regulates conduct but has some effect on protected speech—a prohibition on the destruction of draft cards—and thus precluded the symbolic burning of a draft card for purposes of protest.[90] The *Dale* Court distinguished *O'Brien* and refused to apply its test because "[a] law prohibiting the destruction of draft cards only incidentally affects the free speech rights of those who happen to use a violation of that law as a symbol of protest. But New Jersey's public accommodations law directly and immediately affects associational rights . . . ."[91]

This distinction is not entirely satisfying; the New Jersey law applied only to conduct on its face, and burdened associational rights only in specific instances.[92] By deeming *O'Brien* inapplicable, the Court, in essence, created a stricter standard applicable to expressive association than to expressive conduct. The Supreme Court may have recognized that rules regulating conduct have a more potent effect on associational rights than on speech rights, and thus the Court took measures to ensure that associational rights were not subject to the same tests for constitutionality as expressive conduct, like burning a draft card.

In contrast to the deference given to the Boy Scouts to exclude members in shaping its own message, in a later case the Supreme Court was less willing to accept that associational rights were infringed when a law did not control membership, but required law schools to "interact

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[88] *Dale*, 530 U.S. at 655–56 ("The presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy.").

[89] *Id.* "Expressive conduct" is a term applicable to restrictions on conduct that impair an individual's ability to express him or herself. *See* United States v. O'Brien, 391 U.S. 367, 376–77 (1968). Expressive conduct claims are analyzed within the ambit of free speech claims, not freedom of association claims. *Id.*

[90] *See O'Brien*, 391 U.S. at 376 ("This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.").

[91] *Dale*, 530 U.S. at 659.

[92] In a dissent joined by three other Justices, Justice Souter notes the applicability of *O'Brien* by arguing that the mere inclusion of Dale "sends no cognizable message to the Scouts or to the world. Unlike [the situation in *Hurley*], Dale did not carry a banner or a sign . . . . [T]he mere act of joining the Boy Scouts. . . does not constitute an instance of symbolic speech . . . ." *Id.* at 694–95. Justice Souter cites *O'Brien* for the proposition that "we cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Id.* at 695 (internal quotation marks omitted) (quoting *O'Brien*, 391 U.S. at 376).

with" and provide some support services for those it wished to exclude.[93] In *Rumsfeld v. Forum for Academic & Institutional Rights*, the Court held that a coalition of law schools' expressive-association rights were not violated by the Solomon Amendment,[94] a federal law mandating that universities either allow military recruiters onto their campuses or forgo millions of dollars in federal funding, effectively compelling them to allow the military to recruit on their campuses.[95] The law schools argued that the Solomon Amendment infringed on their right against compelled speech and their right to expressive association because the military's practice of excluding gays meant that they could not enforce their nondiscrimination policies.[96] In this case, therefore, the entity invoking the First Amendment was also the entity championing values of equality.

A unanimous Court first rejected the law schools' claim that the Solomon Amendment unconstitutionally regulated the schools' speech and expressive conduct.[97] Chief Justice Roberts distinguished *O'Brien* on the grounds that the act of excluding military recruiters did not communicate an obvious message, but became expressive only by speech accompanying that action.[98] According to the Court, "[t]he fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection under *O'Brien*."[99]

The Court also rejected the law schools' expressive-association argument—that their ability to "express their message that discrimination on the basis of sexual orientation is wrong is significantly affected by the presence of military recruiters on campus and the schools' obligation to assist them."[100] It is important to note that, again, the Court used separate standards to assess the schools' free speech/expressive-conduct claims and their expressive-association claim. In the context of the expressive-association claim, the Court distinguished *Dale* by holding that allowing military recruiters to visit a law school for a short time in order to hire students does not mean that the recruiters are actually "associat[ing]" with the law school or that the law school is being forced "to accept members it does not desire."[101] According to the Court, citing to *Dale* "overstates the expressive nature of [the law schools'] activity and the impact of the Solomon Amendment on it[.]"[102] Because the law schools were not actually required to accept new members, the law schools' self-determination that their message opposing sexual

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[93] Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (*FAIR*), 547 U.S. 47, 69 (2006).
[94] 10 U.S.C. § 983 (2006).
[95] *Id.*
[96] *FAIR*, 547 U.S. at 52.
[97] *Id.* at 65–66.
[98] *Id.* at 66.
[99] *Id.*
[100] *Id.* at 68.
[101] *FAIR*, 547 U.S. at 69 (citations omitted) (internal quotation marks omitted).
[102] *Id.* at 70.

orientation discrimination could not be conveyed if the military was permitted access to campus was deemed insufficient by the Court.[103]

The Court's approach to expressive association, as evidenced by the cases in this section, has been deferential to a group's view of its own message and purpose when confronting regulations that affected a group's ability to select its membership. The Court has also been much more solicitous and protective of expressive association when an organization wished to exclude those who did not share its beliefs, beliefs around which groups must be permitted to organize, as opposed to when an organization excluded prospective members based on immutable characteristics.

This approach was drastically altered by the Court's recent decision in *Christian Legal Society v. Martinez*.[104] In *Martinez*, the Court with little fanfare or acknowledgement erased both the distinction between protections for free speech and protections for freedom of association, and the distinction between involuntary status and chosen beliefs or conduct.

III. MARTINEZ'S SUBTLE SHIFTS

The Court's most recent expressive-association case examined whether a university policy requiring all student organizations to allow all students to be voting members and to run for leadership positions violated the students' freedom of expressive association.[105] This issue was framed by the majority in *Martinez* as whether the University of California, Hastings College of the Law, a public law school, could "condition its official recognition of a student group—and the attendant use of school funds and facilities—on the organization's agreement to open eligibility for membership and leadership to all students[.]"[106] From the outset, the Court wished to distinguish this case as one involving university subsidization and sought to depart from its expressive-association jurisprudence.

A. Background

Martinez came to the Court after a decade of clashes between Christian student groups and their universities. Between 1999 and 2000,

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[103] *Id.* at 69, 70.

[104] Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971 (2010).

[105] *Id.* at 2978.

[106] *Id.*

Christian groups at many universities were derecognized or threatened with derecognition because of the organizations' desire to limit membership to those who adhered to their beliefs and practiced their preferred conduct.[107] These clashes were sometimes resolved through litigation,[108] but never considered by the Supreme Court until the conflict between Hastings and its Christian Legal Society in *Martinez*.

Officially recognized student groups at Hastings can seek financial assistance from the law school to hold events, and are also permitted to use campus facilities, bulletin boards, e-mail lists, and Hastings's name and logo.[109] To receive these benefits, student groups must abide by Hastings's policies, including its nondiscrimination policy.[110] Like many public accommodations laws, including California's,[111] this policy prohibits student groups from discriminating "on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation."[112] According to the Supreme Court, both parties stipulated that Hastings applied this nondiscrimination policy as an "all-comers policy," meaning that all student groups were required to "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs."[113]

The Christian Legal Society, an association of Christian law students, was denied recognition based on Hastings's all-comers policy because, according to Hastings, CLS's bylaws "barred students based on religion and sexual orientation."[114] CLS sought an exemption from Hastings's nondiscrimination policy so that it could limit its group to those whose beliefs reflected the group's core ideology.[115] Specifically, CLS believed that "sexual activity should not occur outside of marriage

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[107] These colleges included Arizona State University, Ball State University, Boise State University, California State University (several campuses), Cornell University, Gonzaga University, Harvard University, Milwaukee School of Engineering, Ohio State University, Pace University, Pennsylvania State University, Purdue University, Rutgers University, Shippensburg University of Pennsylvania, Southern Illinois University, State University of New York at Oswego, Texas A&M University, Tufts University, University of Florida, University of Georgia, University of Idaho, University of Iowa, University of Mary Washington, University of Minnesota, University of Montana, University of New Mexico, University of North Carolina at Chapel Hill, University of North Dakota, University of Toledo, University of Wisconsin (several campuses), Washburn University, and Wright State University. For information on these individual cases, see www.thefire.org.

[108] *See infra* Part V.A.

[109] *Martinez*, 130 S. Ct. at 2979.

[110] *Id.* (citation omitted).

[111] *Id.* at 2990. According to the majority, "Hastings' policy . . . incorporates—in fact, subsumes—state-law proscriptions on discrimination[.]" *Id.*

[112] *Id.* at 2979.

[113] *Id.* (alteration in original) (citation omitted). CLS contended that the university actually applied its nondiscrimination policy, not this stipulated-to all-comers policy, but the Court rejected this argument. *Id.* at 2982–84. Justice Alito argued in dissent that the all-comers policy was created in response to this litigation, and that the law school actually consistently applied and invoked its nondiscrimination policy, even when denying recognition to CLS. *Id.* at 3001–02 (Alito, J., dissenting).

[114] *Martinez*, 130 S. Ct. at 2980.

[115] *Id.*

between a man and a woman[,]" and CLS wanted to only elect leaders who espoused the views articulated in CLS's "Statement of Faith."[116] When its request for an exemption was denied, CLS sued Hastings, claiming that the denial of its recognition violated its rights to free speech, expressive association, and free exercise of religion.[117]

B. Importation of Forum Analysis

In analyzing CLS's claims, Justice Ginsburg first executed a major legal maneuver. Instead of analyzing CLS's free speech and expressive-conduct claims separately from its expressive-association claim, the *Martinez* majority conflated these claims. This conflation ignored the fact that, in prior cases, the Court explicitly analyzed an organization's speech claims and expressive-association claims independently, using separate lines of jurisprudence.[118] According to the Court, CLS's "expressive-association and free-speech arguments merge" because "*who* speaks on its behalf, CLS reasons, colors *what* concept is conveyed[.]"[119] Therefore, it "makes little sense to treat CLS's speech and association claims as discrete."[120] This reasoning, however, could apply to any organization's expressive-association claim.

The Court cited only one case to support its conflation of speech with expressive association—*Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*.[121] Protective of the First Amendment, the Court held that certain regulations may infringe on both the right to expression and the right to association because these rights are interrelated.[122] The *Berkeley* Court concluded that a California ordinance limiting contributions to organizations formed to support or oppose ballot initiatives "plainly contravenes both the right of association and the speech guarantees of the First Amendment."[123] However, *Berkeley* never held or implied that speech and associational rights cannot also be analyzed separately, as the Court had done in its line of expressive-association cases, and never speculated about whether a regulation can infringe upon freedom of association without impairing freedom of speech.

Once the *Martinez* Court determined that CLS's speech and

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[116] *Id.*

[117] *Id.* at 2981.

[118] *See supra* notes 93–103 and accompanying text (discussing Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 69 (2006)).

[119] *Martinez*, 130 S. Ct. at 2985.

[120] *Id.*

[121] 454 U.S. 290 (1981).

[122] *Id.* at 300 ("A limit on contributions in this setting need not be analyzed exclusively in terms of the right of association or the right of expression. The two rights overlap and blend; to limit the right of association places an impermissible restraint on the right of expression.").

[123] *Id.*

association claims merged, it assessed the all-comers policy's burden on expressive association using the forum analysis applicable to speech restrictions on government property.[124] Instead of applying strict scrutiny to burdens on expressive association, as articulated in *Roberts* and *Dale*, Justice Ginsburg applied the much more deferential level of review used for restrictions impacting speech in limited public forums.[125] A limited public forum is established when the government opens its property to a limited class of speakers or for discussion of specific topics to promote the exchange of ideas.[126] Speech restrictions in this type of forum are constitutional, so long as they are reasonable and viewpoint neutral.[127]

Applying the relatively deferential limited public forum test in an especially deferential way,[128] the Court upheld Hastings's all-comers policy, deeming it both viewpoint-neutral and reasonable.[129] In conducting its analysis, the *Martinez* Court imported another concept foreign to expressive-association jurisprudence, and also foreign to its cases involving limited public forums at universities—the idea that student groups have fewer First Amendment rights when a university lends them financial support or the use of its facilities.

C. Deferential Review for Universities Wielding Carrots

After merging CLS's speech and expressive-association claims, the Court further justified applying the deferential test relevant to limited public forums by stressing that *Martinez* involved the denial of benefits, including monetary support and the use of Hastings's facilities, instead

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[124] *Martinez*, 130 S. Ct. at 2984–85; *see also supra* note 5 (describing forum analysis).

[125] *Martinez*, 130 S. Ct. at 2985. According to the Court, "the strict scrutiny we have applied in some settings to laws that burden expressive association would, in practical effect, invalidate a defining characteristic of limited public forums— the State may reserv[e] [them] for certain groups." *Id.* at 2985 (alterations in original) (internal quotation marks omitted) (quoting Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995)).

[126] *See Rosenberger*, 515 U.S. at 829 ("The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.").

[127] *Id.* at 829–30. The requirement of viewpoint neutrality prohibits the government from "discriminating against speakers based on particular views, beliefs, or opinions[.]" Marvin Ammori, *Beyond Content Neutrality: Understanding Content-Based Promotion of Democratic Speech*, 61 FED. COMM. L.J. 273, 283–84 (2008). "[A] law suppressing political (or, say indecent) speech would be content-based but not viewpoint-based; a law suppressing *Republican* political (or indecent) speech would be viewpoint-based." *Id.* at 284.

[128] Brownstein & Amar, *supra* note 4, at 510–11 (describing how the Court gave Hastings a significant amount of deference in applying its limited public forum test). Brownstein argues that the Court did not say much about whether 'Hastings's policy was actually reasonable. Brownstein and Amar ask,"[G]iven its open-endedness, what purposes does the RSO policy really serve? Does a policy that allows any group, formed around any set of ideas or activities, to exist—but also requires each such group to take all persons, even those who may vehemently disagree with those ideas or activities—make a lot of sense?"

Id. at 510.

[129] *Martinez*, 130 S. Ct. at 2995.

of a direct regulation prohibiting membership limitations.[130] According to the majority,

> [T]his case fits comfortably within the limited-public-forum category, for CLS, in seeking what is effectively a state subsidy, faces only indirect pressure to modify its membership policies; CLS may exclude any person for any reason if it forgoes the benefits of official recognition. The expressive-association precedents on which CLS relies, in contrast, involved regulations that compelled a group to include unwanted members, with no choice to opt out.[131]

The Supreme Court's earlier expressive-association cases did not indicate that withholding benefits or "dangling the carrot of subsidy" should be distinguished from "wielding the stick of prohibition."[132] In fact, some of the Court's earlier expressive-association cases explicitly blurred the distinction between direct and indirect burdens on expressive association.[133] In *Roberts*, for example, the Court held that expressive association is burdened by laws that "impose penalties or withhold benefits from individuals because of their membership in a disfavored group[.]"[134] Yet the newfound emphasis on this distinction in *Martinez*—and the extra deference given to universities as a result—permeated the Court's application of the limited-public-forum test.

First, the Court found that Hastings's all-comers policy was reasonable in light of the purpose of the forum.[135] The Court determined that Hastings reasonably believed that "the . . . educational experience is best promoted when all participants in the forum must provide equal access to all students[,]"[136] and deferred to Hastings's view that student organizations are intended to promote "tolerance, cooperation, and learning."[137] Although these may be laudable values for a school to promote, the Court overlooked its categorization of the student organizational forum in prior cases as promoting and encouraging a diversity of viewpoints, especially minority viewpoints, to flourish.[138]

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[130] As Justice Alito notes in dissent, "funding plays a very small role in this case. Most of what CLS sought and was denied—such as permission to set up a table on the law school patio—would have been virtually cost free." *Id.* at 3007 (Alito, J., dissenting). Justice Alito disputes the majority's characterization of this case as involving a university subsidy, simply because a public university is lending its facilities. Much of a public university campus, especially for its students, is a public forum, where they eat, sleep, and converse outside of class. According to Justice Alito, "[i]f every such activity is regarded as a matter of funding, the First Amendment rights of students at public universities will be at the mercy of the administration." *Id.*

[131] *Id.* at 2986 (majority opinion).

[132] *Id.*

[133] *See supra* notes 23–53 and accompanying text (describing *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and *Healy v. James*, 408 U.S. 169 (1972)).

[134] Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984).

[135] *Martinez*, 130 S. Ct. at 2988–91.

[136] *Id.* at 2989 (alteration in original) (citations omitted) (internal quotation marks omitted).

[137] *Id.* at 2990.

[138] *See* Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000) (noting that

The Court also overlooked the contradiction inherent in establishing a forum for students to organize around shared interests and ideologies while prohibiting students from limiting their groups to those who subscribe to those interests and ideologies.[139] In fact, Justice Kennedy's concurring opinion recognized the tension between facilitating a diversity of viewpoints and promoting tolerance.[140] Kennedy acknowledged that "[b]y allowing like-minded students to form groups around shared identities, a school creates room for self-expression and personal development[,]" but nevertheless believed that this result undermined what Hastings described as its reason for creating the forum—to increase interactions between students of different beliefs.[141]

The Court, in analyzing the reasonableness of the all-comers policy, relied heavily on the fact that Hastings was "subsidizing" student organizations.[142] According to the *Martinez* majority, Hastings could reasonably "decline to subsidize with public monies and benefits conduct of which the people of California disapprove."[143] Yet the Supreme Court had never before, in a case involving student organizations, given added deference to universities because student organizations are subsidized.[144] Of course, the majority opinion acknowledged that Hastings could not similarly decline to subsidize organizations with *viewpoints* disapproved by California voters,[145] due to the *speech* protections afforded in the limited-public-forum test. But discrimination in selecting an organization's members constituted *conduct*, and the Court did not separately assess the constitutionality of this conduct using its expressive-association jurisprudence.[146] Had it done so, the Court would have examined the burden placed on CLS's associational rights by a policy affecting its membership. Specifically, it would have denied CLS the ability to restrict its group to members who share a common belief

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student organizations with minority views must be "treated with the same respect" as those with majority views); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 840 (1995) (describing how, in funding student organizations, a school's purpose is "to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life").

[139] There was significant evidence that Hastings's all-comers policy was actually created as a pretext for penalizing groups with certain disfavored viewpoints. *See Martinez*, 130 S. Ct. at 3001–04 (Alito, J., dissenting) (cataloguing various "student groups with bylaws limiting membership and leadership positions to those who agreed with the groups' viewpoints").

[140] *Id.* at 2999 (Kennedy, J., concurring).

[141] *Id.*

[142] *Id.* at 2990.

[143] *Id.* (citations omitted) (internal quotation marks omitted).

[144] *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 832–33 (1995) (rejecting university's argument that it deserves greater latitude to craft policies implicating the use of its facilities, which are "scarce resources"); Widmar v. Vincent, 454 U.S. 263 (1981) (overturning university regulation prohibiting student organizations from using its facilities for religious purposes); Healy v. James, 408 U.S. 169, 180 (1972) (overturning university president's derecognition of student group).

[145] *Martinez*, 130 S. Ct. at 2994 n.26 ("Although registered student groups must conform their conduct to the Law School's regulation by dropping access barriers, they may express any viewpoint they wish—including a discriminatory one.").

[146] *See supra* notes 104–06, 118–23 and accompanying text.

and would have determined whether that burden was justified by governmental interests.

The Court also gave considerable deference to Hastings in the face of CLS's argument that an all-comers policy left student organizations susceptible to "hostile takeovers," whereby those opposing a group's message will join the group in order to undermine the group's speech or fulfillment of its mission.[147] According to the Court, "[i]f students begin to exploit an all-comers policy by hijacking organizations to distort or destroy their missions, Hastings presumably would revisit and revise its policy."[148] The import of this statement is unclear, but it appears that the Court simply trusted Hastings to protect minority viewpoints in the face of any potential developments—a remarkable display of deference given the First Amendment rights at stake.[149] This extraordinary level of deference and solicitude also impacted Justice Ginsberg's analysis when CLS questioned the viewpoint neutrality of the all-comers policy and in the Court's blurring of the distinction between status and belief.

D. Viewpoint Neutrality and the Status/Belief Distinction

The Court found Hastings's all-comers policy to be viewpoint neutral under the speech test for viewpoint neutrality in a limited public forum. As the *Martinez* majority noted, the all-comers policy applied to all student groups regardless of their views.[150] Groups are free to express discriminatory *views* so long as they do not engage in discriminatory *conduct*.[151] Applying the free speech test associated with "expressive conduct,"[152] the Court also found that the all-comers policy was "justified without reference to the content [or viewpoint] of the regulated speech."[153] Under these tests, created for the free speech context, Hastings's policy is viewpoint neutral.[154] The Court, however,

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[147] *Martinez*, 130 S. Ct. at 2992.

[148] *Id.* at 2993.

[149] In other cases involving student organizations, the Court has carefully scrutinized a university's motives for enacting its policies and given special solicitude to minority views. *See Rosenberger*, 515 U.S. at 823 (overturning university policy denying funding to student publications that "primarily promote[] or manifest[] a particular belief in or about a deity or an ultimate reality" based on a suspicion that the university would not apply this policy evenhandedly); Gregory B. Sanford, Note, *Your Opinion Really Does Not Matter: How the Use of Referenda in Funding Public University Student Groups Violates Constitutional Free Speech Principles*, 83 NOTRE DAME L. REV. 845, 851 (2008) (arguing that the *Rosenberger* Court "demonstrated that it is willing to look beyond assertions that restrictions [upon student groups] are content-based to find that the restriction actually discriminates based on viewpoint").

[150] *Martinez*, 130 S. Ct. at 2993.

[151] *Id.* at 2994.

[152] Expressive conduct is implicated when conduct, like burning a draft card, is unquestionably expressive. *See supra* notes 90–92 and accompanying text.

[153] *Martinez*, 130 S. Ct. at 2994 (alteration in original) (internal quotation marks omitted) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

[154] *See id.*

overlooked the fact that forced exclusion or inclusion of members with beliefs antithetical to an organization—which constitutes conduct, not speech—is one of the paradigmatic burdens on expressive association.[155] Free speech protections cannot safeguard this conduct from governmental intrusion.

Free speech protections also do not recognize the distinction, critical to protecting expressive association, between discriminating on the basis of involuntary status and limiting membership to students of chosen beliefs or conduct. The Court rejected CLS's argument that a policy would be constitutional if it permitted "exclusion because of *belief* but forb[ade] discrimination due to *status*."[156] According to Justice Ginsburg, "that proposal would impose on Hastings a daunting labor . . . . [of] determining whether a student organization cloaked prohibited status exclusion in belief-based garb[.]"[157] Yet in the expressive-association context, the Supreme Court had never before concerned itself with the difficulty of policing the distinction between status-based and belief-based selection, and, indeed, has hinged its opinions on this distinction in the past.[158] The Court's assertion that "[o]ur decisions have declined to distinguish between status and conduct" cites to Fourteenth Amendment rights of substantive due process and equal protection.[159] These cases are profoundly distinct because, in the Fourteenth Amendment context, the state is the entity criminalizing belief-based behavior that may be a pretext for discriminating on the basis of status.[160] In the expressive-association context, private groups, who are not prohibited from discriminating by the Constitution and who do not possess the power of the state, often wish to select members who share their core values for the purposes of expression, not discrimination.

After denying CLS's expressive-association claim, the Court left open for review the question of whether Hastings applied its all-comers policy in an unconstitutionally selective way to penalize certain groups. According to CLS, "[t]he peculiarity, incoherence, and suspect history of the all-comers policy all point to pretext."[161] The *Martinez* majority remanded this issue for the lower courts to address in the first instance.[162]

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[155] *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) ("Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express. Thus, '[f]reedom of association . . . plainly presupposes a freedom not to associate.'" (alternation in original) (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984))).

[156] *Martinez*, 130 S. Ct. at 2990.

[157] *Id.*

[158] *See supra* Part II.B.

[159] *Martinez*, 130 S. Ct. at 2990.

[160] *Id.* ("When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination." (internal quotation marks omitted) (quoting Lawrence v. Texas, 539 U.S. 558, 575 (2003))); Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").

[161] *Martinez*, 130 S. Ct. at 2995 (alteration in original) (citation omitted) (internal quotation marks omitted).

[162] *Id.* On remand, the Ninth Circuit held that CLS had not preserved this issue for review and declined to address it. *See* Docket in Christian Legal Soc'y v. Kane, No. 06-15956, 2006 WL

The Court's ultimate holding—that Hastings's all-comers policy was reasonable and viewpoint neutral—is defensible if one accepts that Hastings applied the policy equally to all student groups, and grants Hastings its contention that the purpose of student organizations is to promote "tolerance, cooperation, and learning." However, there is a strong argument that it is unreasonable to establish a forum for expression but not protect an organization's ability to safeguard its expression when choosing members. As scholars have argued, it defies logic to establish a forum where student groups can have particular religious or political identities but then cannot select members or leaders based on those identities.[163] The Court overlooked the inherent contradictions in fostering expressive associations through an all-comers policy.

Moreover, to reach its holding that Hastings's policy was reasonable and viewpoint neutral, the Court essentially negated CLS's freedom of expressive-association claim by treating it as coterminous with a free speech or expressive-conduct claim. The Court also gave added deference to universities by focusing heavily on the university's provision of facilities and official recognition,[164] and further erased the distinction between status and belief. The next section examines these choices and their implications for expressive association.

IV. THE DANGER OF MERGING SPEECH AND EXPRESSIVE ASSOCIATION IN A LIMITED PUBLIC FORUM

As detailed in the previous section, the major legal development in *Martinez* was the Court's decision to merge its analysis of speech and expressive-association claims when made by participants in a limited public forum. The decision to apply the "more lenient test governing 'limited public forums'" to CLS's expressive-association claim was likely outcome-determinative,[165] yet was accompanied by scant authority or explanation of how the expressive-association doctrine will be affected.[166] Although there are legitimate reasons for merging speech

997217 (D. Cal. May 19, 2006).

[163] *See* Brownstein & Amar, *supra* note 4, at 510.

[164] Although courts must afford "a degree of deference to a university's academic decisions, within constitutionally prescribed limits," *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003), the *Martinez* Court relied on the fact that the university was providing its facilities and "subsidizing student organizations" as an unprecedented reason to give Hastings deference. *Martinez*, 130 S. Ct. at 2990–91; *see also supra* Part III.C.

[165] Brownstein & Amar, *supra* note 4, at 507 (quoting *Martinez*, 130 S. Ct. at 2988-93). "The choice of the 'reasonable' and viewpoint-neutral test—that is, the choice of the appropriate doctrinal box or category on the First Amendment case law flowchart—essentially dictated the result." *Id.*

[166] *See Martinez*, 130 S. Ct. at 2985–86; Brownstein & Amar, *supra* note 4, at 515 ("Is the analogy strong enough between the nature of speech regulations and the nature of association regulations to justify applying speech regulation categories to freedom of association claims? The Court clearly thinks that it is. However, the Court does very little to explain why it thinks so or to justify this

and expressive-association claims in a limited public forum,[167] the test affords no independent protection for the right of expressive association. To properly respect both expressive association and the boundaries of a limited public forum, the Court should preserve separate tests for speech and association claims.

A. The Nullification of Associational Rights

According to the majority in *Martinez*, when the "intertwined rights" of free speech and expressive association both arise in a limited public forum, "it would be anomalous for a restriction on speech to survive constitutional review under our limited-public-forum test only to be invalidated as an impermissible infringement of expressive association."[168] Further, "the strict scrutiny we have applied in some settings to laws that burden expressive association would, in practical effect, invalidate a defining characteristic of limited public forums—the State may reserv[e] [them] for certain groups."[169] Perhaps the Court is correct to distinguish between burdens on expressive association in a limited public forum and those relevant to the public sphere, or a traditional public forum.[170] But even accepting that forum analysis is applicable to expressive-association claims,[171] it does not follow that a restriction that is constitutional as a matter of free speech principles cannot unconstitutionally burden expressive association. By merging CLS's speech and expressive-association claims, the Court left the right of expressive association with no independent protection in a limited public forum.[172]

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conclusion.").

[167] *See Martinez*, 130 S. Ct. at 2984–85; Brownstein & Amar, *supra* note 4, at 514.

[168] *Martinez*, 130 S. Ct. at 2985.

[169] *Id.* (alteration in original) (internal quotation marks omitted) (quoting Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 822 (1995)).

[170] See *supra* note 5 for an explanation on the different forums.

[171] Even in the speech context, however, forum analysis has been widely criticized for generating confusion and clouding assessment of First Amendment values. *See, e.g.*, Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1223 (1984) ("Even when public forum analysis is irrelevant to the outcome of a case, the judicial focus on the public forum concept confuses the development of first amendment principles."); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1718–19 (1987) (chronicling examples of public forum criticism); Robert L. Waring, Comment, *Talk is Not Cheap: Funded Student Speech at Public Universities on Trial*, 29 U.S.F. L. REV. 541, 556 (1995) (explaining that the imprecise tests for determining the nature of a particular forum have "generated tremendous confusion and controversy").

[172] Professor Eugene Volokh, in an article cited by the *Martinez* Court, appears to argue that expressive association does not deserve independent protection in a limited public forum because the government does not have a "duty to subsidize" the exercise of constitutional rights. Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1920–23 (2006) (arguing that a governmental "exclusion based on a group's exercise of its expressive association rights is not barred by the No Governmental Viewpoint Discrimination exception" to the "No Duty To Subsidize" principle). This Article addresses Volokh's understanding

The viewpoint-neutrality test governing restrictions affecting speech in a limited public forum does not translate well as a means to safeguard associational rights. Viewpoint neutrality, as applied to pure expression, serves a speech-protective function. In the free speech context, safeguarding viewpoint neutrality ferrets out impermissible governmental motives in restricting speech.[173] As some scholars have argued, the purpose of viewpoint neutrality is to prevent the government from "distort[ing] debate in a way that games the system (here, the marketplace of ideas) to achieve a preordained goal: The rejection of one perspective in favor of the opposing point of view."[174] When pure speech is involved, viewpoint neutral regulations protect minority viewpoints from being targeted by the government, and "[t]he burden on speech created by viewpoint-neutral regulations will, at least formally, fall in a more evenhanded way on competing speakers and ideas."[175]

However, the test for viewpoint neutrality does not protect the right of expressive association in a meaningful way. For example, Hastings's all-comers policy, though upheld as a viewpoint-neutral regulation, essentially nullifies the expressive-association rights of all student groups. Hastings's all-comers policy permits student groups to select members based on "neutral, generally applicable" membership criteria, like requiring members "to pay dues, maintain good attendance, refrain from gross misconduct, or pass a skill-based test[.]"[176] But student groups are forbidden from limiting membership to those who share their views or requiring members to conform their behavior to the group's values.[177] The ability to select members based on ideology in order to promote a group's expression, one of the primary purposes of the right to expressive association, is entirely eroded by Hastings's policy, viewpoint neutral or otherwise.[178]

Further, the viewpoint-neutrality test, which allows the government to set up a forum for speech on certain subjects without manipulating the

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of student organizations and government subsidies in a later section.

[173] *See, e.g.*, Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) ("First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives."); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 227 (1983) (arguing that the Court has "tended increasingly to emphasize motivation as a paramount constitutional concern").

[174] Brownstein & Amar, *supra* note 4, at 516.

[175] *Id.* at 517. Brownstein and Amar compare viewpoint-neutral restrictions to content-neutral restrictions, which restrict speech based on their subject matter or topic. *See* Ammori, *supra* note 127, at 283–84. "The requirement that the government be content-neutral in its regulation of speech means that the government must be both viewpoint neutral and subject matter neutral." Erwin Chemerinsky, *The Fifty-Fifth Cleveland-Marshall Fund Lecture: The First Amendment: When the Government Must Make Content-Based Choices*, 42 CLEV. ST. L. REV. 199, 202–03 (1994).

[176] Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2980 n.2 (2010).

[177] *Id.* ("Hastings' open-access policy, however, requires . . . that student organizations open eligibility for membership and leadership regardless of a student's status or beliefs.").

[178] The majority in *Martinez* also blithely overlooks the fact that groups most needing First Amendment protection—those with minority or unpopular views or with the most determined enemies—will be most vulnerable to "hostile takeovers." *See id.* at 2992.

viewpoints expressed in this forum, does not equally protect student groups from the state manipulating their right to expressive association, and, in so doing, undermining their speech. A university policy denying funding to organizations with liberal views would be viewpoint discriminatory from a speech perspective and therefore unconstitutional. However, a university policy requiring that all student groups elect a Republican student to a leadership role is technically viewpoint neutral because it applies to all student groups regardless of each group's viewpoint. Yet, it is clear that the expressive-association rights of those with a specific viewpoint (such as student groups with views aligned with the Democratic Party or political liberals) are particularly targeted, and that their speech would suffer as a result.

Similarly, a nondiscrimination policy prohibiting student organizations from limiting membership on the basis of religious beliefs is viewpoint neutral from a speech perspective, as it applies to all groups. However, this policy limits the expressive association only of groups with a particular viewpoint—religious groups.[179] As a matter of free speech law, a university policy that denies funding to student organizations whose publications "primarily promote[] or manifest[] a particular belief in or about a deity or an ultimate reality" is considered viewpoint discriminatory.[180] The Supreme Court deemed such a university policy unconstitutional, even though it applied to speech from an atheistic perspective, because religion provides "a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered."[181] It seems perverse then, that universities can target the *associational* rights of student groups with a religious perspective (atheist or deist), whose *speech* they cannot burden, by mandating that student organizations cannot select their members on the basis of a particular religious perspective.

Just as "Hastings' all-comers requirement draws no distinction between groups based on their message or perspective[,]"[182] a university policy affecting the membership requirements of all student groups can be considered viewpoint neutral from a speech perspective while offering no protection from policies that undermine the expressive-association rights of groups with only certain viewpoints.[183]

The primary reason that protections for expressive association

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[179] *See* Volokh, *supra* note 172, at 1931–33.

[180] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 823, 825, 831 (1995) (citation omitted) (internal quotation marks omitted).

[181] *Id.* at 831.

[182] *Martinez*, 130 S. Ct. at 2993.

[183] In the speech arena, a viewpoint-neutral regulation that has a disparate impact on certain speech is constitutionally permissible, so long as the regulation was not intended to suppress a particular viewpoint or distort debate. *See* Brownstein & Amar, *supra* note 4, at 517–23. Applying this concept to expressive association is misplaced, however, because viewpoint neutrality, as understood in the speech context, does not protect associational rights. Once an amended understanding of viewpoint neutrality is established for expressive association, regulations that are viewpoint neutral but have a disparate impact would also be constitutionally permissible. *See infra* Part IV.B.

cannot be merged with speech protections is that expressive association contains both speech elements (the expression of the group and its members) and conduct elements (the act of excluding or including members in order to promote that expression). Thus, the viewpoint-neutrality test governing speech restrictions in a limited public forum must be modified in recognition of the hybrid nature of expressive association.

B. An Independent Test for Expressive Association

When assessing a student organization's free speech claim, the limited-public-forum test can remain intact. As in *Martinez*, a regulation affecting speech would be upheld if it is viewpoint neutral and reasonable in light of the purposes of the forum.[184] To protect a student organization's right to expressive association, however, a separate standard is needed that appreciates the differences between speech rights and associational rights.

One way to preserve expressive association as an independent right in a limited public forum would be to revive the jurisprudence from cases like *Roberts* and *Hurley*, but apply a greater degree of deference to the government (and less scrutiny to its regulation) in a limited public forum. Burdens on expressive association in a limited public forum could be upheld if a university policy is justified by a substantial reason, unrelated to the suppression of ideas, and is narrowly tailored to achieve the university's reasonable goal. This test borrows language from "intermediate scrutiny" tests applicable to other constitutional rights.[185]

The all-comers policy in *Martinez* is susceptible to invalidation under this test—the reasons justifying the policy appear, to some scholars, dubious and incoherent,[186] and the policy is not a narrowly tailored way of achieving the university's nebulous goals of tolerance and cooperation. The all-comers policy is also extremely burdensome to expressive association, and the university's goals could be achieved in a much less onerous way.[187]

Another alternative is to follow the *Martinez* Court's lead in using the test applicable to speech claims in a limited public forum, but modify the definition of viewpoint neutrality when assessing an expressive-association claim. In this context, viewpoint neutrality should prohibit

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[184] *Martinez*, 130 S. Ct. at 2988.

[185] *See generally* Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 315–22 (1998).

[186] *See, e.g.*, Brownstein & Amar, *supra* note 4, at 540–41.

[187] *See Martinez*, 130 S. Ct. at 3013–14 (Alito, J., dissenting) (discussing how the all-comers policy is "antithetical" to encouraging a diversity of viewpoints, and "no legitimate state interest could override the powerful effect that an accept-all-comers law would have on the ability of religious groups to express their views.").

restrictions on student groups that target the *inclusion* or *exclusion* of certain viewpoints. For example, a nondiscrimination policy preventing organizations from selecting their members based on shared religious beliefs (i.e., one which prohibited discrimination on the basis of religion) would be unconstitutional because it targets groups who wish to limit membership to specific religious views, thus affecting their expressive purposes.[188] A university policy prohibiting student organizations from excluding members who belong to particular political ideologies would also be infirm.[189] Thus, a policy mandating that students not exclude, for example, students with particularly liberal views would certainly be aimed at a viewpoint-based exclusion and therefore unconstitutional. However, a nondiscrimination policy preventing organizations from selecting members on the basis of race or gender would be constitutional under this framework because race and gender are not particular viewpoints that can be targeted or suppressed through laws burdening expressive association.[190]

In essence, a viewpoint-neutral policy affecting expressive association would ensure that groups are not targeted for having a particular expressive purpose. Hastings's all-comers policy, at issue in *Martinez*, might still be considered viewpoint neutral. The policy prevents exclusion of all viewpoints equally, save for the substantial evidence that it was enacted to prevent groups like CLS from limiting membership to those who share its religious views.[191]

Crafting a test to apply to expressive association in a limited public forum allows for independent protection of associational rights. However, not everyone believes that associational rights deserve independent protection in a limited public forum. Professor Eugene Volokh, in an article cited by the majority in *Martinez*, argues against

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[188] See *supra* notes 173–83 and accompanying text for a discussion on how regulations targeting those who believe in an "ultimate reality," even if the regulation applies to deist and atheist groups equally, is considered viewpoint based. Because religion, even defined broadly, is considered a viewpoint by the Court, prohibiting exclusions based on religious beliefs would be unconstitutional under this proposed test.

[189] It is unclear whether a regulation targeting political speech, or targeting the associational rights of those who wish to exclude or include political views, would be considered content discriminatory or viewpoint discriminatory. Content-discriminatory regulations are permissible in a limited public forum, whereas viewpoint-discriminatory policies are not. *See supra* note 127 (explaining the difference between content-neutral and viewpoint-neutral restrictions on speech). That said, following the test in *Martinez*, a school would also need a legitimate pedagogical reason to burden "political speech," and thus, modifying the test in *Martinez* to protect associational rights, should similarly need a legitimate pedagogical reason to burden the expressive association of groups who wish to select members on the basis of shared political views.

[190] For further elaboration on this point and the distinction between status and belief/conduct, see *infra* Part V.

[191] *Martinez*, 130 S. Ct. at 3002–03 (Alito, J., dissenting). At oral argument, Justice Scalia noted that, "one reason why I am inclined to think this [all-comers policy] is pretextual is that it is so weird to require the -- the campus Republican Club to admit Democrats, not just to membership, but to officership. To require this Christian society to allow atheists not just to join, but to conduct Bible classes, right? That's crazy." Transcript of Oral Argument, at 34, *Martinez*, 130 S. Ct. 2971 (No. 08-1371), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1371.pdf.

independent protection for associational rights in a limited public forum.[192] Volokh appreciates that, even in a limited public forum, the government may not refuse to fund an organization based on its viewpoint (even if that viewpoint is racist, sexist, or anti-gay), but contends that a university may refuse to fund or provide facilities to organizations that exercise their associational rights in ways objectionable to the school (i.e., CLS's exclusion of those who refuse to disavow premarital sex).[193]

Volokh's argument hinges upon this idea that there is generally "no duty to subsidize" the exercise of constitutional rights, with one of the few exceptions being that the government may not establish a forum for speech and then discriminate against a speaker based on his viewpoint.[194] His article explores the issue of whether "courts should develop an analogous exception barring the government from discriminating based on a group's expressive association decisions[,]" but ultimately concludes, without much analysis, that this analogous exception should not be recognized.[195]

Contrary to Volokh's conclusion, an analogous exception should be recognized. Because speech and expressive association are so intimately intertwined, a university could undermine a group's speech without violating free speech protections by targeting the group's ability to select like-minded members.[196] Moreover, in the student organizational context, the Court has never considered a university's lending of its facilities or funding to be a governmental subsidy in the same way it has in other contexts, and for good reason. When a university sets up a forum for speech, that speech is considered entirely private and not attributable to the school. Especially in this context, a student organization's right to expressive association merits protection, just as much as its right to free speech.

C. Debunking the Subsidies Myth

It is undeniable that universities like Hastings, in establishing student organizations, provide facilities and often some modicum of funding to student groups. Moreover, the student organizational forum is considered to be a limited public forum, and First Amendment restrictions are subject to less exacting scrutiny than in a traditional public forum.[197] The forum created for student organizations, however,

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[192] Volokh, *supra* note 172, at 1923.
[193] *Id.*
[194] *Id.* at 1924–28.
[195] *Id.* at 1923, 1938–41.
[196] In fact, this was the contention in *Martinez*. *See Martinez*, 130 S. Ct. at 3004 (Alito, J., dissenting).
[197] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829–30 (1995).

is one dedicated to the promotion of a diversity of views,[198] and the Court has unequivocally considered student organizations to engage in *private* speech.[199] Although universities may expend resources, they do not "sponsor" student organizations in any meaningful way. Especially given that student organizations comprise an array of diverse and conflicting views, it would be inconceivable to attribute all of these views to the university. Too often, the term *subsidy* is conflated with the concept of *sponsorship*.

Using the term "subsidy" to describe the modest provision of facilities and funding provided by universities led the *Martinez* Court, and especially Justice Stevens in concurrence, to incorrectly conflate subsidy with sponsorship and believe that the university's imprimatur is placed on student groups.[200] This confusion afforded universities greater latitude in controlling student groups.[201] Even scholars have difficulty viewing CLS's speech as purely private due to the university's provision of facilities and funding.[202] According to the *Martinez* Court, one reason that Hastings's all-comers policy is reasonable is because "Hastings' policy, which incorporates—in fact, subsumes—state-law proscriptions on discrimination, conveys the Law School's decision to decline to subsidize with public monies and benefits conduct of which the people of California disapprove."[203] Yet the Court, invoking the concept of subsidies in order to give the university more deference,[204] never explains why it is permissible for a university to create an all-comers policy and thereby decline to "subsidize" an organization's exercise of its

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[198] *See id.* at 840 (describing the purpose of funding student organizations as "to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life").

[199] *See id.* at 841–42 ("The University has taken pains to disassociate itself from the private speech involved in this case. The Court of Appeals' apparent concern that Wide Awake's religious orientation would be attributed to the University is not a plausible fear, and there is no real likelihood that the speech in question is being either endorsed or coerced by the State[.]").

[200] According to Justice Stevens, a "free society" must tolerate organizations that "exclude or mistreat Jews, blacks, and women—or those who do not share their contempt for Jews, blacks, and women[,]" but this society "need not subsidize them, give them its official imprimatur, or grant them equal access to law school facilities." *Martinez*, 130 S. Ct. at 2998 (Stevens, J., concurring). This contention seems to imply that universities do not have to "sanction" groups whose ideology involves hate or bigotry, a contention that even the majority in *Martinez* rejects. *See id.* at 2994 n.26 (majority opinion) ("Although registered student groups must conform their conduct to the Law School's regulation by dropping access barriers, they may express any viewpoint they wish—including a discriminatory one.").

[201] Justice Stevens wrote quite explicitly that, contrary to the Supreme Court's earlier understanding of the student organizational forum, "[i]t is not an open commons that Hastings happens to maintain. It is a mechanism through which Hastings confers certain benefits and pursues certain aspects of its educational mission." *Martinez*, 130 S. Ct. at 2998 (Stevens, J., concurring). Further, the university "could not remain neutral— in determining which goals the program will serve and which rules are best suited to facilitate those goals." *Id.*; *see also supra* Part III.

[202] *See* Toni Massaro, *Christian Legal Society: Six Frames*, 38 HASTINGS CONST. L.Q. 569 (2011). Massaro, analyzing the issue of subsidies and state action, argued that, although the school's speech was not so entangled with CLS's speech as to render its exclusion of certain students a state action, "[t]he school was involved in a way that it would not have been if no funding, no imprimatur, and no conditions were involved." *Id.* at 589.

[203] *Martinez*, 130 S. Ct. at 2990 (citation omitted) (internal quotation marks omitted).

[204] *See supra* Part III.B

right to expressive association, but impermissible for a university to decline to "subsidize" groups whose speech the university finds objectionable.[205]

No other Supreme Court case addressing student organizations has considered them "subsidized" by universities or used this term to give deference to universities when analyzing the constitutionality of university policies.[206] Further, as one scholar commented, in any limited public forum, "[c]onditions on benefits and fora do *not* differ as sharply from direct regulation of private conduct as the 'carrots v. sticks' dichotomy implies."[207] Given that universities cannot condition access to their facilities in ways that manipulate the viewpoints expressed by their student organizations, a university should also be precluded from burdening expressive association as a way of limiting unpopular expression.

Citing Professor Volokh's article entitled *Freedom of Expressive Association and Government Subsidies*,[208] the *Martinez* Court noted that "[s]chools, including Hastings, ordinarily, and without controversy, limit official student-group recognition to organizations comprising only students—even if those groups wish to associate with nonstudents."[209] But Volokh attempts to derive too much from this argument; acknowledging that universities may constitutionally preclude nonstudents from joining student groups does not in turn mean that all burdens on freedom of expressive association are constitutional. Instead, the constitutionality of a university's burden on expressive association should be tested using a modified viewpoint-neutrality test that permits universities to place limitations on student organizations without targeting the inclusion or exclusion of certain viewpoints.[210]

V. THE NECESSARY DIFFICULTIES OF THE STATUS/BELIEF DISTINCTION

As explained in the previous sections, the *Martinez* majority erased the previously recognized distinction in the expressive-association

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[205] In *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000), the Supreme Court held that a public university must allocate the funds to student organizations from its mandatory student activities fee in a viewpoint-neutral fashion. *Southworth*, 529 U.S. at 233–34. Thus, a university cannot fund a pro-life group but not a pro-choice group simply because it is providing university facilities. Student organizations of all ideologies deserve the same chance to be funded, so that "minority views are treated with the same respect as are majority views." *Id.* at 235.

[206] *See Southworth*, 529 U.S. at 217; Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995); Widmar v. Vincent, 454 U.S. 263 (1981); Healy v. James, 408 U.S. 169, 180 (1972).

[207] Massaro, *supra* note 202, at 583 (emphasis added).

[208] *See* Volokh, *supra* note 172.

[209] Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2985 (2010) (citation omitted).

[210] *See supra* Part IV.B.

jurisprudence between discrimination on the basis of status and selection on the basis of belief.[211] This distinction is critical, however, to preserving the right to expressive association in a limited public forum, where private organizations should be entitled to limit membership to those who share their views.[212] As a matter of policy, society should also recognize the difference between truly invidious forms of discrimination, based on immutable characteristics, and discrimination on the basis of shared values, a central feature of associational rights. The final section of this Article explores the status/belief distinction and address the criticisms of this distinction.

A. "Good" and "Bad" Forms of Discrimination

In its pre-*Martinez* cases, the Supreme Court struck a delicate balance between liberty interests protected by the Constitution and society's interest in equality and ensuring equal access to goods and services. These cases emphasized that a private organization's exclusion of those who oppose the group's views should be constitutionally protected because it preserves the expressive purposes of the organization.[213] In contrast, exclusion of individuals based on immutable characteristics, or status, is typically not necessary to safeguard expressive association.[214] The distinction between selection based on belief or conduct rather than status separates a "good" kind of discrimination from the kind that should be the target of antidiscrimination laws—that on the basis of qualities that cannot be altered, such as race, gender, ethnicity, or sexual orientation.

Hastings's all-comers policy wished to "allow any student to participate, become a member, or seek leadership positions, regardless of [her] status or beliefs,"[215] as if beliefs are an immutable trait upon which it would be unfair to deny a student membership. The *Martinez* majority seized upon this conflation in order to uphold Hastings's laudable desire to promote tolerance and cooperation among its students.[216] But, in oral

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[211] *See supra* Part III.

[212] *See* Charles Morris, *Association Speaks Louder Than Words: Reaffirming Students' Right to Expressive Association*, 19 GEO. MASON U. C.R. L.J. 193, 196 (2008) ("[T]he Supreme Court and lower courts have consistently held that organizations may exclude potential members whose ideologies and values are fundamentally opposed to the groups' collective ideology and values.").

[213] *See supra* Part II.

[214] *See, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 625 (1984) ("[D]iscrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.").

[215] Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2979 (2010) (alteration in original) (citation omitted) (internal quotation marks omitted).

[216] *Id.* at 2990. Justice Ginsburg even claimed that "[o]ur decisions have declined to distinguish between status and conduct in this context[,]" but failed to cite to any cases involving expressive

argument, Chief Justice Roberts, who joined the dissenting opinion, stressed the difference between protected and unprotected forms of discrimination.

> [G]ender or race is fundamentally different from religious [belief]. Gender and race is [sic] a status. Religious belief—it has to be based on the fundamental notion that we are not open to everybody. We have beliefs, you have to subscribe to them. And we've always regarded that as a good thing. That type of exclusion is supported in—in the Constitution. The other types of exclusion are not.[217]

Chief Justice Roberts propounded the view that a private organization's selectivity on the basis of belief is a positive quality, something to be promoted, even if it may be framed under the rubric of discrimination on the basis of religion.[218] Selectivity on the basis of belief allows groups to organize around a coherent viewpoint, and enables minority views to survive despite majoritarian pressure.[219] Associating with like-minded individuals to exchange views and amplify one's voice, which necessarily involves some form of "discrimination," is at the heart of expressive association.[220]

Hastings initially denied recognition to CLS for discriminating not only on the basis of religion, but also on the basis of sexual orientation, an immutable characteristic.[221] In fact, a pre-*Martinez* case from the Seventh Circuit, which upheld the expressive-association claim of a CLS chapter at Southern Illinois University School of Law,[222] found that the University's CLS group did not discriminate based on sexual orientation, but only on the basis of belief.[223] According to the Seventh Circuit, CLS "interprets its statement of faith to allow persons 'who may have homosexual inclinations' to become members of CLS as long as they do not engage in or affirm homosexual conduct."[224] Moreover, only

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association. *Id.*; *see also supra* notes 118–27 and accompanying text.

[217] Transcript of Oral Argument, at 46–47, *Martinez*, 130 S. Ct. 2971 (No. 08-1371).

[218] It is important to note that this discrimination on the basis of belief should be considered only a "good" thing when exercised by private organizations, in order to promote expressive association. This Article does not wish to disturb nondiscrimination laws as they apply to the employment context, where First Amendment protections are not as salient. *See generally* Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 J.C. & U.L. 385 (2009).

[219] *See supra* notes 18–20 and accompanying text.

[220] However, discrimination on the basis of the religion into which an individual is born, if he or she no longer practices that religion, represents discrimination on the basis of an immutable status, and presumably would not be sanctioned by Chief Justice Roberts.

[221] *Martinez*, 130 S. Ct. at 2974 ("Hastings rejected CLS's application for [registered student organization] status on the ground that the group's bylaws did not comply with Hastings' open-access policy because they excluded students based on religion and sexual orientation.").

[222] The Christian Legal Society is a nationwide organization, with chapters on campuses across the country. *Id.* at 857–58.

[223] Christian Legal Soc'y v. Walker, 453 F.3d 853 (7th Cir. 2006).

[224] *Id.* at 860 (citation omitted) (granting a preliminary injunction against application of a university's nondiscrimination policy to a CLS chapter on expressive association grounds).

"heterosexual persons who do not participate in or condone heterosexual conduct outside of marriage may become CLS members[.]"[225] The Seventh Circuit acknowledged the importance of the status/belief distinction.[226] It held that "CLS's membership policies are thus based on belief and behavior rather than status," and enjoined the application of Southern Illinois University School of Law's nondiscrimination policy against the group.[227]

Professor Eugene Volokh, in his article cited by the *Martinez* majority, also argued that a group's exclusion of individuals who refuse to condemn homosexuality does not constitute status-based sexual orientation discrimination.[228] According to Volokh, this exclusion would instead be "based on holding a certain viewpoint that secular people could hold as well as religious ones."[229] Of course, the group would have to exclude both heterosexuals "who disagree with [certain religious] teachings on this issue" and "practicing homosexuals," or else the group "would be engaging in prohibited sexual orientation discrimination, not permitted religious discrimination."[230]

Many scholars and courts, however, find the status/belief distinction problematic, particularly when applied to sexual orientation. In contrast to a characteristic like gender, where identification as male or female does not necessarily dictate specific beliefs or behavior, the distinction between immutable sexual orientation and sexual conduct is less clear. In the final section, this Article addresses criticisms of the status/belief distinction.

B. Objections to the Status/Belief Distinction

A major, compelling objection to the status/belief distinction is that it does not adequately protect certain individuals from status-based discrimination in cases where status and belief (or conduct) are intertwined. The *Martinez* majority highlighted this concern when it quoted *Bray v. Alexandria Women's Health Clinic*,[231] an equal protection case, for the proposition that "[a] tax on wearing yarmulkes is a tax on Jews."[232] It is true that if the government wished to discriminate against

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[225] *Id.*

[226] *Id.*

[227] *Id.* This nondiscrimination policy mandated that Southern Illinois University will "provide equal employment and education opportunities for all qualified persons without regard to race, color, religion, sex, national origin, age, disability, status as a disabled veteran of the Vietnam era, sexual orientation, or marital status." *Id.* at 858 (citation omitted) (internal quotation marks omitted).

[228] *See* Volokh, *supra* note 172, at 1938.

[229] *Id.*

[230] *Id.*

[231] 506 U.S. 263, 270 (1993).

[232] Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2990 (2010) (internal quotation marks omitted) (quoting Bray v. Alexandria Women's

individuals who are ethnically Jewish, an easy way to accomplish this would be to target conduct associated only with those who are Jewish, for example wearing yarmulkes. In *Bray*, however, the Supreme Court rightly noted that when the state or an individual chooses an irrational object for disfavor, such as a tax on yarmulkes, it can be assumed that the disfavor is motivated by status-based animus.[233] When performed by the government, this type of irrational, animus- or status-based classification is prohibited by the Fourteenth Amendment's Equal Protection Clause.[234]

Analogously, if a student organization excluded students for an arbitrary reason usually associated with a particular status—*with no indication of how this exclusion would affect the group's ability to organize around a coherent ideology*—this exclusion could be considered status-based and therefore not protected by expressive association under the First Amendment. Further, discrimination against an individual based on the religion into which he or she was born, in contrast to selecting individuals based on their current beliefs, would be considered unprotected status-based discrimination. For instance, if Jews or Muslims were excluded from a group due to their ethnicities, a university's application of nondiscrimination policy to prevent this type of discrimination should withstand constitutional scrutiny.[235]

Religious "discrimination" presents a relatively easy case for discerning the difference between status-based and belief-based exclusions. Although some may argue that religion confers a "status,"[236] individuals are free to discard their religious or atheistic views at any point. Thus, CLS's desire to limit its membership to those who subscribe to its statement of faith represents a belief-based exclusion, which should be protected by expressive association, just as if a campus environmentalist group wished to limit its membership to those who acknowledge global warming.

A more difficult case involves private organizations' exclusion of those who engage in homosexual conduct. As scholars have forcefully argued, there is something "disingenuous" in "tell[ing] someone it is

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Health Clinic, 506 U.S. 263, 270 (1993)).

[233] *Bray*, 506 U.S. at 270 ("Some activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed.").

[234] *See generally* Cass R. Sunstein, *The Supreme Court 1995 Term: Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996) (discussing the invalidation of statutes motivated by animus towards gays and African Americans).

[235] It is also important to note that a far greater societal injustice occurs when the government classifies individuals on the basis of immutable characteristics than when private organizations, who are not subject to the Fourteenth Amendment, engage in exclusionary practices.

[236] *See* Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61, 104 (2006) ("I have the same reaction to those who blithely assume a religious person can easily disengage her religious belief and self-identity from her religious practice and religious behavior. What do they think being religious means?"). Professor Feldblum incorrectly conflates immutable characteristics, like race or sexual orientation, with religious identity and beliefs, which are voluntary. *Id.*

permissible to 'be' gay, but not permissible to engage in gay sex."[237] Another scholar explained that "[t]he love, intimacy, and affection that lesbian, gay, and bisexual people share with their same-sex partners is indeed a crucial element in sexual orientation, and insofar as the status/conduct distinction denies that reality, it pollutes the theoretical discourse on homosexuality."[238] *Being* gay and actively loving someone of the same sex are much more deeply and inextricably intertwined than, for example, being female and having certain views, or engaging in certain conduct.[239]

These arguments against the status/belief distinction as applied to sexual orientation have great purchase, especially when analyzing *governmental* discrimination or criminalization of conduct associated with LGBT individuals.[240] When the government criminalizes homosexual conduct, for instance, it prohibits gays from engaging in behavior intimately connected with who they are.[241] However, private organizations exist to promote a diversity of views, and gays can continue to champion equality in, or simply become a member of, organizations that support, or are neutral about, gay rights. Further, organizations that accept those who identify as LGBT but practice abstinence (or condemn homosexual acts) cannot be categorized as excluding members who engage in homosexual conduct as a pretext for excluding all gays. Sexual orientation may be immutable, but sexual conduct is certainly voluntary. As disadvantageous as that recognition is for gay rights and important societal interest in equality, it cannot be ignored in the context of private organizations exercising their rights to expressive association. Recognizing the difference between sexual orientation and sexual conduct does not "pollute the discourse." In fact, it seems that those who wish to mandate that Christian groups accept gays as members seek to manufacture an artificial version of tolerance through coercion.

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[237] *Id.*

[238] Teresa M. Bruce, Note, *Doing the Nasty: An Argument for Bringing Same-Sex Erotic Conduct Back Into the Courtroom*, 81 CORNELL L. REV. 1135, 1170–71 (1996).

[239] *See* Diane H. Mazur, *The Unknown Soldier: A Critique of "Gays in the Military" Scholarship and Litigation*, 29 U.C. DAVIS L. REV. 223, 225 (1996) ("The status/conduct distinction . . . denies the importance of normal human intimacy."); Roderick M. Hills, Jr., *Is Amendment 2 Really a Bill of Attainder? Some Questions About Professor Amar's Analysis of Romer*, 95 MICH. L. REV. 236, 249–50 (1996) ("[G]ays and lesbians are not interested in merely 'being gay' (whatever that means): they are interested in conduct: making love, forming relationships, dating, displaying photos of partners in the workplace, wearing wedding rings, living together in rental units, holding hands in public, and otherwise expressing desire, affection, and commitment.").

[240] *See* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2990 (2010) ("Our decisions have declined to distinguish between status and conduct in this context."). *Martinez* quoted *Lawrence v. Texas*, 539 U.S. 558, 575 (2003), for the proposition that "[w]hen homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination." *Martinez*, 130 S. Ct. at 2990; *see also Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class.").

[241] *Martinez*, 130 S. Ct. at 2990.

Moreover, contrary to the *Martinez* Court's assertion, it would not be unduly burdensome to discern whether a religious organization excluded those who engage in homosexual conduct as a pretext for excluding gays.[242] If the Christian Legal Society truly wished to exclude gays, this status-based discrimination would become apparent when a religious LGBT student who believed that homosexuality is a sin attempted to join the group. In addition, there are complex problems inherent in administering a policy like the all-comers policy, which does not distinguish between status and belief. A university administering an all-comers policy presumptively takes on the responsibility of policing all student groups, from political newspapers to religious groups to advocacy groups, in order to ensure that they are not in some way discouraging people hostile to their message from joining. Asking expressive organizations not to "discriminate" on the basis of their expressive purpose runs contrary to their raison d'être, and it will be difficult to monitor compliance with this policy. For instance, what if a libertarian publication allows all students to join, but never gives any editing responsibility to non-libertarian students? This denies certain students the benefits of membership enough to consider them essentially excluded.

On the other side of the spectrum, some might argue that the status/belief distinction is not protective enough of expressive association. In a limited public forum, removing protection for status-based discrimination might impede some organizations' ability to promote their views, especially if these organizations wish to use status-based exclusion to exemplify their beliefs.[243] The inability to discriminate on the basis of status might leave, for example, an orthodox Jewish student group that wanted only men to lead prayer services unprotected.[244]

However, at least for the purposes of a limited public forum, safeguarding an organization's right to select members based on a shared ideology respects a core aspect of freedom of association—the ability to exclude those of differing views. Specifically, it allows the government, or a public university, to place limitations on private organizations while adhering to a viewpoint-neutral test. This may cause the derecognition of student groups that seek to exclude members based on status, but it preserves a balance between associational rights in a limited public forum and the important societal interest in equality.

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[242] *Id.* ("CLS proposes that Hastings permit exclusion because of *belief* but forbid discrimination due to *status*. But that proposal would impose on Hastings a daunting labor. How should the Law School go about determining whether a student organization cloaked prohibited status exclusion in belief-based garb?" (citation omitted)).

[243] *See supra* notes 76–87 and accompanying text (discussing Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000)).

[244] *See* Transcript of Oral Argument, at 45–46, *Martinez*, 130 S. Ct. 2971 (No. 08-1371) (Alito, J.) ("If an orthodox Jewish group or a Muslim group applied for recognition and the group said part of our beliefs is—one of our beliefs is that men and women should sit separately at religious services, would Hastings deny registration to that group?").

VI. CONCLUSION

The Supreme Court's dramatically different approach to expressive association in *Christian Legal Society v. Martinez* failed to protect the rights of student groups that wish to select members on the basis of shared ideology. Merging speech and expressive-association claims essentially nullifies associational rights in a limited public forum, where the resources the government provides to set up a platform for expression are at times minimal. The *Martinez* majority's dramatic legal maneuver was executed with little support or fanfare, and the majority failed to acknowledge that expressive association contains both speech and conduct elements that cannot be adequately protected using the viewpoint-neutrality test applicable to speech rights in a limited public forum.

This Article proposes alternative ways to analyze a student organization's challenge to a university policy that burdens its expressive-association rights. In crafting these alternatives, this Article attempts to respect the constraints of a limited public forum and society's interest in equality while providing a framework that safeguards expressive association. Expressive association should be recognized as separate from speech, even in a limited public forum, because it is so fundamental to the preservation of speech and minority viewpoints. The courts must find a way to afford the government greater deference to implement policies that burden expressive association in a limited public forum, while ensuring that both the essential qualities of the right are preserved and that the government does not act with an impermissible motive.

Disparate Impact Is Not Unconstitutional

Michael Evan Gold*

I. INTRODUCTION

Title VII of the Civil Rights Act of 1964[1] ("Title VII" or the "Act") prohibits employers, employment agencies, and labor unions from discriminating against workers or denying them employment opportunities on the basis of race, color, religion, sex, or national origin.[2]

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[1] Pub. L. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C.A. § 2000e–2000e-17 (West 2006). References to section numbers in this essay pertain to this statute.

[2] 42 U.S.C.A. § 2000e-2 (West 2006).

The Act created the Equal Employment Opportunity Commission, which receives, investigates, and conciliates charges of discrimination and occasionally sues to enforce the Act.[3] Except where the context demands otherwise, I will use "employers" to stand for all of the agents who are prohibited from discriminating, "race" to stand for all of the prohibited bases of discrimination, "black applicants" to stand for all of the classes protected by the Act, "white applicants" to stand for all of the comparators to whom protected classes compare themselves, and "hiring" to stand for all of the employment contexts to which the Act applies.

In *Ricci v. DeStefano,*[4] the "New Haven Firefighters" case, white firefighters and one Hispanic firefighter sued the city of New Haven, Connecticut and city officials under Title VII. The plaintiffs claimed the city had committed intentional discrimination or disparate treatment[5] against them when the city disregarded the results of promotion examinations that had an adverse effect[6] on black and Hispanic applicants. The Supreme Court sustained the claim.[7]

In his concurring opinion, Justice Scalia invited attorneys in subsequent cases to consider arguing that the disparate impact theory of employment discrimination is unconstitutional.[8] He reasoned as follows:

- The Constitution prohibits the government from committing disparate treatment.
- Therefore, the government may not enact laws that require an employer to commit disparate treatment.[9]
- An employer who abandons a practice that has a disparate *impact* commits disparate *treatment* against the persons whom the practice favors because the employer seeks to increase the percentage of black applicants whom the practice favors.
- An employer who abandons a practice that has a disparate impact in order to avoid being sued by members of the class which the practice disfavors has been required by the

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[3] 42 U.S.C.A. § 2000e-4 (West 2006).

[4] 129 S. Ct. 2658 (2009).

[5] See text at nn.35–37 below.

[6] *See infra* notes 38–45 and accompanying text.

[7] *Ricci*, 129 S. Ct. 2658.

[8] "[I]t is clear that Title VII not only permits but affirmatively *requires* [remedial race-based actions] when a disparate-impact violation *would* otherwise result. But if the Federal Government is prohibited from discriminating on the basis of race, then surely it is also prohibited from enacting laws mandating that third parties — e.g., employers, whether private, State, or municipal — discriminate on the basis of race. Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decision making is . . . discriminatory." *Ricci*, 129 S.Ct. at 2682 (Scalia, J., concurring) (citations omitted).

[9] *Id.*

government to commit disparate treatment.[10]

Disparate impact is thus unconstitutional in Justice Scalia's view,[11] but his reasoning reflects a misunderstanding of the theory of disparate impact and how it proves discrimination. When disparate impact is understood correctly, no constitutional issue arises.

II. HISTORY OF THE TERM "DISCRIMINATION"

In the first edition of their treatise EMPLOYMENT DISCRIMINATION LAW, Barbara Lindemann Schlei and Paul Grossman identified the two principal theories of discrimination under Title VII. They called one of these theories "disparate treatment," which refers to intentional discrimination. In a disparate treatment case, the evidence must show that an employer denied an employment opportunity to a black applicant and the employer's reason was race. The other theory Schlei and Grossman called "disparate impact," which refers to unintentional discrimination. In a disparate impact case, the evidence must show that an employment practice denied employment opportunities to black applicants as compared to white applicants, and the practice was not job related or a business necessity.[12] The Supreme Court adopted Schlei and Grossman's terminology in 1977[13] and has continued to use it as recently as 2009.[14]

Schlei and Grossman, like other authorities in the field, refer to disparate treatment and disparate impact as theories, not as distinct legal claims.[15] The legal theories of disparate treatment and disparate impact are not claims in and of themselves, but rather ways of proving a claim.[16] Justice Lewis F. Powell, Jr. held the same view.[17] In *Connecticut v. Teal*, he wrote:

> while disparate-treatment cases focus on the way in which an individual has been treated, disparate-impact cases are concerned with the protected group. . . . The Court,

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[10] *Id.*

[11] *Id.*

[12] BARBARA LINDEMANN SCHLEI AND PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1–12 (1976).

[13] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

[14] *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2673 (2009).

[15] *See* HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAL, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE 165 (2d ed. 2001).

[16] *See id.* (referring to disparate treatment and disparate impact as "mode[s] of proof" for a Title VII claim).

[17] *Connecticut v. Teal*, 457 U.S. 440, 458–59 (1982) (Powell, J. dissenting) (citation omitted) (italics in original).

> disregarding the distinction drawn by our cases, repeatedly asserts that Title VII was designed to protect individual, not group, rights. . . . But this argument confuses the *aim* of Title VII with the legal theories through which its aims were intended to be vindicated. It is true that the aim of Title VII is to protect individuals, not groups. But in advancing this commendable objective, Title VII jurisprudence has recognized two distinct methods of proof. In one set of cases—those involving direct proof of discriminatory intent—the plaintiff seeks to establish direct, intentional discrimination against him. . . . In disparate-impact cases, by contrast, the plaintiff seeks to carry his burden of proof by way of *inference*—by showing that an employer's selection process results in the rejection of a disproportionate number of members of a protected group to which he belongs. From such a showing a fair inference then may be drawn that the rejected applicant, as a member of that disproportionately excluded group, was himself a victim of that process' "built-in headwinds."[18]

A few years later, in *Watson v. Fort Worth Bank & Trust*, Justice Sandra Day O'Connor expressed the same view in a section of her opinion in which all other justices participating in the case joined or concurred:

> Several of our decisions have dealt with the evidentiary standards that apply when an individual alleges that an employer has treated that particular person less favorably than others because of the plaintiff's race, color, religion, sex, or national origin. In such "disparate treatment" cases . . . the plaintiff is required to prove that the defendant had a discriminatory intent or motive . . . .
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> In *Griggs v. Duke Power Co.* this Court held that a plaintiff need not necessarily prove intentional discrimination in order to establish that an employer has violated [Title VII]. . . . The factual issues and the character of the evidence are inevitably somewhat different when the plaintiff is exempted from the need to prove intentional discrimination. The evidence in these "disparate impact" cases usually focuses on statistical disparities, rather than specific incidents, and on competing explanations for those disparities.
>
> The distinguishing features of the factual issues that typically dominate disparate impact cases do not imply that the ultimate legal issue is different than in cases where

[18] *Id.* (italics in original; underline added).

disparate treatment analysis is used.[19]

I agree with Schlei and Grossman and Justices Powell and O'Connor that disparate treatment and disparate impact are ways of proving the same thing, namely, discrimination. The following questions arise: what is discrimination, and how is it proven by disparate treatment and disparate impact?

Because Congress did not define "to discriminate" in Title VII, we assume that this verb carries its ordinary English meaning in the statute.[20] The Oxford English Dictionary provides this etymology: Latin *discriminare* from *discrimen -minis* "distinction", from *discernere* DISCERN.[21] The root meaning of "to discriminate," therefore, is simply to distinguish, and so the verb was used for generations. In the early seventeenth century, "to discriminate" meant to make or constitute a difference in or between. George Grote, for example, wrote of "capacities which discriminate one individual from another."[22] The point of view of the verb at that time was objective, not subjective; the differences inhered in the objects being compared, not in the mind of the agent observing them. By the middle of the seventeenth century, however, use of the verb was becoming more subjective in viewpoint. At that time "to discriminate" meant to distinguish with the mind; perceive the difference between. Isaac Barrow wrote, "We take upon us . . . to discriminate the goats from the sheep."[23] Substantially the same meaning carried into the late eighteenth century, but by then "to discriminate" had become fully subjective, focusing only on the mind of the agent. Henry Thomas Buckle wrote, "It is by reason, and not by faith, that we must discriminate in religious matters . . ."[24] and the United States *Scientific American* stated, "A simple energy measurement serves [i.e., allows us] to discriminate between the two kinds of event."[25] The emotional significance of the verb appears to have been either neutral (as a synonym of "to distinguish") or positive (as in having discriminating taste).

The sense in which "to discriminate" is most commonly used today first appeared in the late nineteenth century: to "make a distinction in the treatment of different categories of people or things, especially unjustly or prejudicially *against* people on grounds of race, colour, sex, social status, age, etc."[26] Mark Twain wrote of being "discriminated against on

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[19] 487 U.S. 977, 985-987 (1988)(citations omitted) (underline added) (Justice Kennedy not participating).

[20] F.D.I.C. v. Meyer, 510 U.S. 471, 476 (1994) ("In the absence of . . . a definition, we construe a statutory term in accordance with its ordinary or natural meaning.").

[21] THE CONCISE OXFORD DICTIONARY 386 (9th ed. 1995).

[22] GEORGE GROTE, FRAGMENTS ON ETHICAL SUBJECTS 59 (1876).

[23] ISAAC BARROW, THE WORKS OF ISAAC BARROW 219 (1845).

[24] HENRY BUCKLE, HISTORY OF CIVILIZATION IN ENGLAND 253 (1858).

[25] THE NEW SHORTER OXFORD ENGLISH DICTIONARY 689 (Thumb Index ed. 1993).

[26] *Ibid.*

account of my nationality"[27] in his non-fiction work, A TRAMP ABROAD. Fifty years later, Reinhold Niebuhr opined in his study on ethics and politics that "[e]ducational suffrage tests ... would discriminate in favor of the educated Negro against the servile, old-time Negro."[28] The viewpoint remained subjective, but the connotation of the verb had become negative because the notion of unjust advantage had been added to the root meaning of "to distinguish." Mark Twain was asserting that discrimination against Americans was unjust; Reinhold Niebuhr believed that all Negroes should be enfranchised.

Thus, the prevalent understanding of "to discriminate" in the United States in the twentieth century included a notion of an unjust disadvantage. This understanding was grounded on a strong sense of the basic equality of persons and an equally strong reaction to being the victim of an unjust distinction. When Congress enacted Title VII, a definition of "to discriminate" was no more necessary than a definition of other terms in the statute, such as "race" or "to segregate." Americans understood then, as we do now, that to discriminate is to make an unjust distinction. This definition preserves the older sense of "to distinguish"—discrimination always involves a comparison—and adds the modern value judgment of injustice.[29]

Accordingly, to discriminate in Title VII meant, and continues to mean, "to distinguish unjustly." In the context of employment, "to distinguish" means to grant an employment opportunity to one person and to deny it to another person. An employer can deny an employment opportunity to a worker in many ways that are unjust. The words "because of . . . race, color, religion, sex, or national origin"[30] in Title VII indicate that it applies only to these recognized bases of injustice. Therefore, under the Act "to discriminate . . . because of race" means to deny an employment opportunity to a worker on the basis of race.

III. TITLE VII

Both disparate treatment and disparate impact are methods by which a plaintiff can prove that an employer unjustly distinguished in the award of employment opportunities. The injustice in both models of proof lies in the basis of the distinction, which is race. In disparate treatment, the basis of the distinction is race because race is the

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[27] MARK TWAIN, A TRAMP ABROAD 172 (Harper 1879).

[28] REINHOLD NIEBUHR, MORAL MAN AND IMMORAL SOCIETY 80 (Scribner 2003).

[29] The popular understanding of "to discriminate" continues to change. I often hear younger persons make the verb transitive, and they sometimes omit the element of comparison, making the word into a synonym of "to disadvantage." Thus, "He discriminated me" can mean simply "He treated me badly." These changes, though increasingly common, are not yet standard.

[30] 42 U.S.C.A. § 2000e-2(a) (West 2006).

employer's conscious reason for the distinction.[31] In disparate impact, the basis of the distinction is also race, though race is not the employer's conscious reason for the distinction. Instead, the employer's reason for the distinction is an employment practice which the employer intends to serve a non-racial purpose.[32] The practice, however, does not serve its purpose. The practice serves only to distinguish between black and white applicants. Thus, the injustice of a practice with a disparate impact is that race is the actual basis for the distinction.

A. Disparate Treatment

The elements of the disparate treatment model of proof are as follows:

- The employer is covered by Title VII;
- The employer offered a particular employment opportunity;
- The plaintiff was qualified for the opportunity;
- The plaintiff was willing to accept the opportunity;
- The employer denied the opportunity to the plaintiff; and
- The employer's reason for the denial was the plaintiff's race.[33]

The first five elements are normally proven with direct, conventional evidence. For example, the second element might be proven by evidence that the employer advertised for a mechanic, and the third element by evidence that the plaintiff had five years' experience as a mechanic. The last element can be proven with the same sort of evidence.[34] For example, the supervisor who decided which applicant to hire may have said the firm already had enough black mechanics. More often, however, the last element is proven by inference.[35] For example, the white applicants whom the employer hired for the job may have had less training and experience than the plaintiff. Although this evidence does not prove conclusively that the employer rejected the plaintiff because of race, the evidence is sufficiently suggestive of a racial motive to expect the employer to offer a non-discriminatory explanation for not hiring the black mechanic.

Typically, an employer defends against disparate treatment by

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[31] *See* Michael Evan Gold, *Towards a Unified Theory of Employment Discrimination*, 22 BERKELEY J. EMP. & LAB. L. 175, 218 (2001).

[32] *Id.* at 218–36.

[33] BLACK'S LAW DICTIONARY (9th ed. 2009); *see* GOLD, *supra* note 31 at 192.

[34] *Id.* at 181.

[35] *See* Hunt v. Cromartie, 526 U.S. 541, 553 (1999) ("Outright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence.").

attacking the proof of one or more elements of the prima facie case, for example, by disputing the plaintiff's qualifications or by identifying a non-discriminatory reason for denying the opportunity to the plaintiff. An employer may also raise two affirmative defenses: relying in good faith on an opinion letter from the Equal Employment Opportunity Commission,[36] or basing a decision on religion, sex, or national origin when that characteristic is a bona fide occupational qualification for the opportunity.[37]

The elements in the disparate treatment model of proof show that the employer has distinguished between a black and a white applicant in the award of an employment opportunity. The defenses are ways of negating this showing. Direct attack on one of the elements of the prima facie case would obviously serve this purpose. The affirmative defenses serve the same purpose. If the employer relied in good faith on an opinion letter from the Equal Employment Opportunity Commission, then the basis of the employer's act was the letter, not race. If the job required a worker to be a woman, then the basis of the employer's refusal to hire men was not their gender, but the requirements of the job.

Therefore, the elements of the disparate treatment model of proof and the defenses address whether or not the employer was guilty of discrimination as we normally use that word. An employer who disadvantages a worker because the worker is black unjustly distinguishes between black and white applicants in awarding employment opportunities.

B. Disparate Impact

Disparate impact also shows that the employer was guilty of discrimination as we normally use the word. The elements of the disparate impact model of proof are as follows:

- The employer is covered by Title VII;
- The employer offered employment opportunities;
- The qualified labor pool is composed of this number of black applicants and that number of white applicants;
- The employer maintained an employment practice that had an adverse effect on black applicants as compared to white applicants in the qualified labor pool; and
- The practice was not job related.[38]

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[36] 42 U.S.C.A. § 2000e-12 (West 2006).

[37] 42 U.S.C.A. § 2000e-2 (West 2006).

[38] *See* E.E.O.C. v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1274-5 (11th Cir. 2000) (outlining the elements of disparate impact in terms of gender discrimination); New York City Transit Auth. V. Beazer, 440 U.S. 568, 569 (1979) (outlining exception for "job related" criteria).

The first two elements are the same as in disparate treatment and can be proven with conventional evidence. The other elements require explanation.

The third element of disparate impact is the racial composition of the qualified labor pool.[39] The qualified labor pool is the group of workers who are willing and able to perform a job. I maintain that Title VII protects only workers in the qualified labor pool. However, if this proposition strikes the reader as too broad, I would be content with the alternative proposition that only workers in the qualified labor pool are entitled to relief under the Act. Congress did not intend to force an employer to offer a job to an unqualified worker or to pay damages to a worker who was unwilling to take the job.[40]

IV. THE PRIMA FACIE CASE OF DISPARATE IMPACT

It follows that evidence in a disparate impact case must pertain to the qualified labor pool, just as evidence in a disparate treatment case brought by an individual must pertain to a willing and able plaintiff. Plaintiffs in disparate impact cases rarely offer direct evidence of the qualified labor pool. Observing it for most jobs is impractical. Plaintiffs may know which skills a job requires, but lack the resources to obtain from all the workers in the job market reliable information regarding which skills they have and whether they would accept the job if it were offered to them.[41] Consequently, plaintiffs resort to proxies.

A. The Use of Proxies

A proxy represents something else, which is called the universe. If the proxy represents the universe, we know that what is true of the proxy is true of the universe. Usually, the proxy is smaller than the universe. Consider a public opinion poll in which a thousand randomly selected persons constitute a proxy for the general population. Sometimes a proxy is larger than the universe. Suppose we are planning to build a new school, and we want to know how many lockers to place in the gymnasium. We cannot ask students who will attend the school whether they will participate in sports and need lockers, but we can look at numerous other schools, observe the percentage of students in those schools who use lockers in the gymnasium, and extrapolate for our

[39] EEOC Compliance Manual §15-VI, 2006 WL 4673429.

[40] Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971); *See* 42 U.S.C.A. § 2000e-12 (West 2006).

[41] *See* Carpenter v. Boeing Co., 456 F.3d 1183, 1199 (10th Cir. 2006); Alabama v. United States, 304 F.2d 583, 586 (5th Cir.) *aff'd per curiam*, 371 U.S. 37 (1962); WAYNE C. CURTIS, STATISTICAL CONCEPTS FOR ATTORNEYS: A REFERENCE GUIDE 91 (1983).

school. I will use the term "fair proxy" to refer to a proxy that accurately represents the relevant universe.

In employment discrimination cases, the relevant universe is the qualified labor pool. A common proxy is the applicant pool for the job. This proxy is fair in most cases because it captures interest well (applicants are willing to accept the job) and captures qualifications fairly well (workers usually do not apply for jobs which they are unable to perform), as courts have recognized for several decades.[42] More accurately, there is usually no reason to believe that any difference exists in the ability of black and white applicants to perform a job for which they have applied or in their willingness to accept the job. Another common proxy for the qualified labor pool is the general population, which is a fair proxy when the job is unskilled or the employer provides training in the necessary skills.[43]

A fair proxy allows us to learn the racial composition of the qualified labor pool. Knowing what percentage of these workers is white and what percentage is black lays the basis for the next element in a disparate impact case, namely, proof that a specific practice of the employer denies opportunities to proportionally more black than white applicants who are interested in and qualified for the job. I will say that such a practice has an "adverse effect" on black applicants.

B. Statistical Theory

The archetypical disparate impact case involves a written test on which white applicants are more successful than black applicants. For example, suppose that 90% of white test takers and 75% of black test takers pass. The question is whether the test has an adverse effect on the latter. The persons who took the test are a fair proxy for the qualified labor pool. This proxy captures interest in the job because workers rarely expend the effort to take a test for a job they would not accept. We cannot know *a priori* how well this proxy captures ability, but we begin with the assumption, absent evidence to the contrary, that ability is distributed proportionally across racial groups. As a result, we expect that proportionally as many black as white applicants will pass the test.

Does the fact of a disparity between expectation and observation prove that the test has an adverse effect? The answer is no because a degree of randomness affects even a fair process. The true effect of a

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[42] "Where a validity study is conducted in which tests are administered to applicants... the sample of subjects must be representative of the normal or typical candidate group for the job or jobs in question. This further assumes that the applicant sample is representative of the minority population available for the job or jobs in question in the local labor market." U.S. v. Georgia Power Co., 474 F.2d 906, 916 (1973).

[43] *See, e.g.* Rutherford v. City of Cleveland, 179 Fed App'x 366, 381–82 (6th Cir 2006); *see also* CURTIS, *supra* note 41 at 91.

test is its normal outcome over many administrations, not its effect in a single administration.[44] Typically, however, plaintiffs know only the result of a single administration of a test. Can a single administration prove anything? The answer is yes, thanks to statistical theory. If the outcome of a single trial is distant enough from the normal expectation (in other words, is unlikely to have occurred by chance), it is "statistically significant." In plain English, the disparity is meaningful.[45] There is reason to believe that the outcome was not simply a random variation in a fair process, but rather was influenced by a specific cause.

This reasoning can be applied to our example of a written test upon which an employer makes hiring decisions. We begin with the expectation that equal percentages of black and white applicants will pass the test. We observe that 90% of white applicants but only 75% of black applicants pass. Our statistician informs us that this result is statistically significant and is unlikely to occur by chance. We conclude that the test has an adverse effect on black workers.

Proof that an employment practice has an adverse effect on black applicants completes the plaintiffs' prima facie case of disparate impact. Yet a statistically significant disparity—an adverse effect—does not prove discrimination. We know that the disparity probably has a cause, but we do not know what the cause is.[46] In our example, if the cause were that the black applicants were less qualified for the job than the white applicants, the cause would be just; if the cause were the race of the applicants, the cause would be unjust. Accordingly, the next step in the disparate impact model of proof is to determine whether the cause of the disparity is just or unjust.

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[44] This point can be understood intuitively. Imagine that someone tosses a coin 100 times and records the outcome, then conducts 999 more such trials, records the results, and averages them. We would expect that the average outcome over the 1,000 trials would be very close to 50% heads and 50% tails. We would not, however, expect the outcome of every individual trial to have the same distribution. Similarly, although we would expect that equal percentages of black and white test takers would pass a fair test that is administered 1,000 times, we should not expect the pass rates on any given administration of the test to be equal.

[45] This point can also be understood intuitively. Suppose *A* offers to make a bet with *B*. One of them will toss a coin one hundred times. *A* will win ten dollars for each result of heads in excess of fifty; *B* will win ten dollars for each result of tails in excess of fifty. *B* accepts the bet. The outcome is sixty-five heads and thirty-five tails, and *B* loses one hundred fifty dollars. *B* might well think, "Sixty-five, thirty-five is a very unusual result. There is a big disparity between what I expected, which was fifty-fifty or something close to it, and what occurred. Something strange happened."

[46] Think again of *A's* bet with *B*. If *B* supplied the coin and did the tossing, *B* would have no good reason to think that the cause of the disparity was suspicious. But if *A* supplied the coin, *B* might suspect that the coin was loaded; or if *A* did the tossing, *B* might suspect that *A* knew a trick for tossing heads.

V. DEFENSES

A. Business Necessity

The principal defense in the disparate impact model of proof is known as "business necessity."[47] The employer can vindicate an employment practice that has an adverse effect on black applicants by proving that the practice is "job related and consistent with business necessity."[48] "Business necessity" is a term of art. It means that the employer must prove not that the practice is essential to the business, but only that the practice truly serves a non-racial business purpose. A practice is job related if it distinguishes workers who are qualified for a job from workers who are not qualified for it. A job-related practice serves a non-racial business purpose.

As a matter of procedure, business necessity is an affirmative defense. As a matter of substance, however, an employer's failure to prove business necessity completes the plaintiffs' prima facie case of discrimination. The plaintiffs' proof that a practice has an adverse effect does not establish discrimination. The element of injustice has not been proven. A disparity, however large and however significant, can have a just or an unjust cause. A just cause is a practice which distinguishes on the basis of genuine qualifications for the job, and something else causes proportionally fewer black applicants to be qualified. An unjust cause is a practice which distinguishes on some basis other than qualifications, and race causes the adverse effect.

B. Job Relatedness Disproves Adverse Effect

If the employer proves that a practice is job related, the evidence demonstrates that the workers who are rejected by the practice are unqualified. Therefore, proof that a practice with an adverse effect on black applicantss is job related establishes that the cause of the disparity is just. The cause is black applicants' comparative lack of qualifications. If the employer fails to prove the practice is job related, we are left with an employment practice that has an adverse effect and is not job related. Such a practice distinguishes among applicants on some basis other than qualifications. As far as the evidence demonstrates, the black applicantss

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[47] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity."); *see* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (once plaintiff has made a prima facie case of discrimination, burden "must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.").

[48] 42 U.S.C.A. § 2000e-2 (West 2006).

who are rejected are as qualified as the white applicantss who are selected. Nonetheless, although a practice that is not job related selects among applicants at random with respect to qualifications, the practice does not select at random with respect to race. That the disparity is statistically significant means that the practice consistently favors white applicants over black applicants. That is, the practice selects on the basis of race and, therefore, race is the cause of the disparity.

Consider another typical case, one involving an unscored objective selection criterion. Suppose an employer requires that all assembly line workers hold a high school degree. Because proportionally more white than black applicants complete high school,[49] the plaintiffs prove that this criterion has an adverse effect on black applicants. The burden then shifts to the employer to prove the criterion is job related or "valid." Proof of validity may not be based on intuition or common sense; a rigorous validation study must be conducted. Suppose our employer's study shows that the criterion predicts success on the job, that is, that workers who hold degrees perform the job better than workers who lack degrees. The employer proves that the criterion is job related. Workers who lack degrees are unqualified, and the disparity is caused by black applicants' comparative lack of qualifications. Thus, an employer who hires on the results of a valid selection criterion distinguishes among applicants based on their qualifications, not their race. It may be that fewer black applicants than we might expect or desire are qualified, but an employer has every right to hire based on qualifications.

Now suppose the reverse: the employer fails to prove that holding a degree is job related. The selection criterion is not valid. It does not distinguish between qualified and unqualified workers, and those who lack a degree are as likely to succeed on the job as those who hold a degree. Yet because some applicants satisfy the criterion and some do not, the criterion distinguishes among them on *some* basis. What is the basis? The plaintiffs have proven that the criterion has a statistically significant adverse effect on black applicants. Therefore, the criterion *distinguishes on the basis of race*, favoring white over black applicants. Accordingly, an employer who hires on the basis of an invalid unscored objective selection criterion that has an adverse effect distinguishes among workers based on their race, not their qualifications.[50]

It should be clear now that disparate impact does not merely "smoke out" intentional discrimination, as some have contended.[51] Disparate impact proves an injustice that is independent of an employer's intent.

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[49] NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., DUB NO. NCES 2010-028, THE CONDITION OF EDUCATION 2010, Indicator 18 (2010).

[50] Another defense to disparate impact is possible—an employer may prove good-faith reliance on an opinion letter from the Equal Employment Opportunity Commission. An employer is justified in relying on advice from the agency responsible for the protection of workers from discrimination.

[51] 129 S.Ct. 2658 at 2682 (Scalia, J., concurring), citing Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv. L. Rev. 494 at 498-499, 520-521) (2003.)

Let us use the term "disparate impact" to refer to an employment practice that has an adverse effect on black applicants and is not job related. The prima facie case of and defense to disparate impact, taken together, show whether an employer is guilty of discrimination as we normally use that word. An employer who uses a practice with a disparate impact on black applicants unjustly distinguishes between black and white applicants in awarding employment opportunities.

VI. ANALYSIS OF JUSTICE SCALIA'S CONCURRING OPINION

With the foregoing in the reader's mind, I will now demonstrate that Justice Scalia was mistaken and that disparate impact is not unconstitutional. He suggested that disparate impact is unconstitutional because the act of abandoning an employment practice with a disparate *impact* is an act of disparate *treatment*. Justice Scalia's thought is that the motivation for abandoning the practice is to increase the number of black applicants whom the practice favors. In truth, however, the motivation for the act is that the practice is irrational and unjust.

The suggestion of unconstitutionality grew out of the facts of the *New Haven Firefighters* case.[52] The city of New Haven, Connecticut decided which firefighters to promote to lieutenant and captain by means of written and oral examinations[53] that ranked the candidates by their scores.[54] Under the rule of three, each vacancy was to be filled by one of the top three scorers on the examinations.[55] The city administered the examinations in 2003 and observed that they had an adverse effect on African-American and Hispanic candidates; the rate at which these groups passed the examinations was less than 80% of the rate at which white applicants passed.[56] The city did not conduct a validation study to determine whether the examinations accurately predicted success on the

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[52] Ricci v. DeStefano, 129 S.Ct. 2658 (2009).
[53] *Id.* at 2665.
[54] *Id.*
[55] *Id.*
[56] The examination for captain was completed by twenty-five white, eight black, and eight Hispanic candidates. Of these, sixteen white, three black, and three Hispanic applicants passed. Thus, 64% of white candidates passed the examinations for captain, but only 38% of black and Hispanic applicants were successful. For the position of lieutenant, forty-three white, nineteen black, and fifteen Hispanic applicants completed the examinations; twenty-five white, six black, and three Hispanic candidates passed. Thus, 58% of white applicants passed the examinations for lieutenant, but only 32% of black and 20% of Hispanic applicants were successful. Based on these numbers, the Court wrote, "The racial adverse impact here was significant, and petitioners do not dispute that the City was faced with a prima facie case of disparate-impact discrimination." *Id.* at 2677. The Court reached this conclusion by using the "eighty percent rule," under which a practice has an adverse effect if black applicants' rate of success on the practice is less than 80% of white applicants' rate of success. *Id.* at 2666. The Court appears to have adopted the eighty percent rule as the standard for determining whether an employment practice has an adverse effect. The rule, however, is irrational and should be abandoned in favor of statistical analysis. *See* GOLD, *supra* note 31 at 222–23 (2001).

job.[57] Instead, fearing lawsuits from minority candidates who had not passed, the city "threw out the examinations."[58] White applicants who would have been promoted based on the examinations then filed suit. The Supreme Court held that the city intentionally discriminated against the white applicants in violation of Title VII.[59] In the majority opinion, Justice Kennedy wrote that a practice with a disparate impact could cause an employer to commit disparate treatment;[60] and for this reason, Justice Scalia, concurring, suggested that disparate impact may be unconstitutional.[61]

I believe the Court was right in holding against the city for discarding the results of the examinations. The city did not know that they had a disparate impact. The city knew only that they had an adverse effect on black and Hispanic applicants. But, as I demonstrated above, adverse effect is only one element of the disparate impact model of proving discrimination. The other element is the lack of job relatedness, and of this element the city was ignorant. Because the city did not conduct a validation study to determine whether the examinations predicted success on the job,[62] the examinations might have been valid and the candidates with the highest scores might have been well qualified for the job. Alternatively, the examinations might have been invalid and revealed nothing about the candidates' qualifications. Consequently, the city decided to ignore the results of the examinations simply because not enough black and Hispanic applicants passed. Thus, the city distinguished among workers on the basis of race and thereby discriminated against them in violation of Title VII.[63]

Justice Scalia was as wrong as the Court's holding was right. He suggested that requiring employers to abandon a policy with a disparate impact requires employers to discriminate on the basis of race.[64] To see the error of Justice Scalia's suggestion, let us consider the case of an employer who abandons a practice that has an adverse effect and is not

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[57] *Ricci* 129 S. Ct at 2667–68.

[58] *Id.* at 2664.

[59] *Id.* at 2681, 2664–65.

[60] *Id.* at 2674, 2681.

[61] Id. at 2682.

[62] *Ricci*, 129 S. Ct. at 2667–68.

[63] The Court's standard of decision was that "race-based action like the City's in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute." *Id.* at 2664. I believe that the standard which I implicitly advocate in the text—that a practice with an adverse effect may be abandoned only if the practice is not job related—would satisfy the Court's standard. If a practice truly has a disparate impact, the employer can certainly demonstrate "a strong basis in evidence . . . that it would have been liable" for discrimination. *Id.* My standard might even be more rigorous than the Court's, for a strong basis in evidence might be something less than full-fledged proof of disparate impact.

I disagree, however, with the Court's characterization of the employer's action in such a case as "race-based." As I argue in the following text, abandoning a practice that has a disparate impact is not a race-based action. Rather, abandoning the practice is a non-discriminatory step that rationally serves the legitimate interests of the employer's business.

[64] *Id.* at 2682.

job related, that is, a practice that has a disparate impact. Let us change one fact of the *New Haven Firefighters* case so that it exemplifies this situation which Justice Scalia contemplated. Suppose that after noticing that the promotion examinations had an adverse effect on black and Hispanic applicants, the city had commissioned a validation study which revealed that the examinations were not job related. In this event, the city would have known that the examinations had a disparate impact. Contrary to Justice Scalia's contention, the city would have had lawful reasons to ignore the results of the examinations; indeed, *the city would have had a legal duty to ignore the results.*

The city would have known that the examinations did not serve their purpose. They did not select qualified lieutenants and captains. Instead, they selected randomly with respect to qualifications. Promoting on the basis of such examinations would have been irrational and perhaps a violation of due process.

The city would also have known that the examinations in fact selected candidates on the basis of race. One of the goals of Title VII is to lead employers "to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."[65] Thus, Justice Scalia's contention is 180 degrees off the mark. To act on the results of examinations with the knowledge that they do not identify qualified candidates, but do select on the basis of race, is surely to commit disparate treatment.

VII. CONCLUSION

Thus, the decision to ignore the result of an examination, or to abandon any other practice with a disparate impact, is fully justified. The motivation for the decision is not race, but the flaws of the practice.[66] Therefore, the act of abandoning a practice with a disparate impact is not disparate treatment, the government does not require an employer to commit disparate treatment, and disparate impact is not unconstitutional.

I will conclude by moving the analysis to a higher level of abstraction, but of course reaching the same conclusion. Disparate treatment and disparate impact are models of proof of discrimination. Each in its own way proves the same thing—that an employer unjustly distinguishes between black and white applicants in awarding

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[65] Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (citation omitted).

[66] One can imagine a case in which an employer abandons a practice with a disparate impact, not because the practice is irrational and discriminatory, but because the employer desires to increase the number of black applicants for the job. Such a case would be simple disparate treatment and would pose no threat to the theory of disparate impact.

employment opportunities. An employer who abandons a practice that is unjust because it is unjust ceases to discriminate. Ceasing to discriminate in order to obey the law cannot be discriminatory.

Notes

Eliminating the Use of Restraint and Seclusion Against Students with Disabilities

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I. INTRODUCTION

For the past two decades, throughout the United States, school children with disabilities have been subjected to the use of restraint and seclusion techniques by school personnel on a daily basis. In the early 2000s, reports of school children suffering serious bodily injury, or even death, led the United States Government Accountability Office (GAO) to address the House of Representatives Committee on Education and Labor regarding this issue.[1] The GAO found hundreds of cases alleging abuse and death related to the use of restraint and seclusion on school children.[2] Specifically, the GAO found that almost all of the restraint and seclusion allegations involved students with disabilities.[3] Furthermore, the use of these techniques was often in cases where the

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[1] Gregory D. Kutz, Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers, GAO-09-719T (2009).
[2] *Id.* at 5.
[3] *Id.*

child was not physically aggressive[4] and, more often than not, the teacher or staff member performing these techniques was untrained.[5] As a result, children with disabilities are at a higher risk of serious bodily injury or even death at the hands of those that should be protecting them: teachers, schools, and districts.

A. General Overview

In March of 2010, the House of Representatives passed House Bill 4247, the Keeping All Students Safe Act, but it remains under much criticism as it makes its way to the Senate.[6] The new bill will allow the Secretary of Education to "issue regulations regarding restraint and seclusion practices for students in public and private schools that receive federal funding."[7] Although the Keeping All Students Safe Act is a reasonable starting point in the battle against restraint and seclusion, it is not the solution. This Note will provide an overview of the problems with the use of restraint and seclusion and why it is necessary to eliminate the practice of using restraint and seclusion against children with disabilities, and not simply regulate its use. In order to protect these children, the use of restraint and seclusion needs to be eliminated in its entirety from all schools. If the new bill gets passed, the regulations and guidance issued by the Secretary of Education would not be enough to protect children with disabilities from suffering physical and emotional harm, or even death.

Part I of this Note provides an introduction to the United States Government Accountability Office's Seclusions and Restraints Report presented to the Committee on Education and Labor, and an overview of this note. Part II will provide a description of restraint and seclusion, the purpose of these techniques, and why they are ineffective. Part III will discuss the current situation across the country: a survey of state laws, how courts are dealing with allegations of restraint and seclusion, and why so many educators are protected and not punished. Part IV will provide an overview of the new Keeping All Students Safe Act, and explain why this regulation is not enough. Finally, Part V will explain why it is necessary to eliminate the use of restraint and seclusion from all schools and implement positive behavior interventions in order to ensure

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[4] *Id.* at 8.

[5] *Id.* at 9.

[6] Michelle Diamente, *Restraint and Seclusion Bill Hits Bumpy Road on Path to Senate*, Disability Scoop, Aug. 3, 2010, http://www.disabilityscoop.com/2010/08/03/restraint-senate-iep/9615/.

[7] Keeping All Students Safe Act, H.R. 4247, 111th Cong. (2009).

children with disabilities are protected.

II. USE OF RESTRAINT AND SECLUSION

A. General Definition of Restraint and Seclusion

The two types of restraint most commonly used in a school setting are mechanical and physical restraint.[8] Mechanical restraint "entails the use of any device or object . . . to limit an individual's body movement to prevent or manage out-of-control behavior."[9] The most common forms of mechanical restraint in law enforcement are handcuffs or straitjackets, but in a school setting, mechanical restraints usually include tape, straps, or tie-downs.[10] Mechanical restraints, however, must be distinguished from prescribed mechanical devices used to compensate for orthopedic weaknesses to protect a child or allow them to participate in school activities.[11] Prescribed mechanical devices are used to help a student participate in educational activities, or as a teaching strategy used to increase a student's opportunity to learn.[12] For example, many advocates for children with disabilities feel that a weighted blanket used to calm students with autism or attention deficit disorder is a form of restraint because it is not meant to be a teaching strategy.[13]

Similar to mechanical restraint, physical restraint is any method of "one or more persons restricting another person's freedom of movement, physical activity, or normal access to his/her body."[14] Physical restraint is usually intended to immobilize or reduce "the ability of an individual to move his or her arms, legs, body, or head freely."[15] Physical restraint is often used as a means of "controlling that [child]'s movement,

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[8] Kutz, *supra* note 1, at 1. Although there is a third form of restraint, chemical restraint, which is typically only used in hospitals or other medical facilities. Chemical restraint is the use of medication to control a child's behavior. The Council for Children with Behavior Disorders, CCBD's Position Summary on the Use of Physical Restraint Procedures in School Settings 3 (2009) [hereinafter CCBD Position Summary (Restraint)].

[9] CCBD Position Summary (Restraint), *supra* note 8, at 2. The definitions of mechanical and physical restraint are often combined into one definition. *See* Kutz, *supra* note 1, at 1.

[10] CCBD Position Summary (Restraint), *supra* note 8, at 2.

[11] *Id.*

[12] *See id.* If a device is prescribed by a physician, physical therapist or school nurse with "specific recommendations for lengths of time of use and other circumstances for their use," then these types of "assertive devices should not be considered mechanical restraint." *Id.*

[13] *See id.*

[14] CCBD Position Summary (Restraint), *supra* note 8, at 3. Physical restraint may also be known as "ambulatory restraint, manual restraint, physical intervention, or therapeutic holding." *Id.*

[15] Kutz, *supra* note 1, at 1.

reconstituting behavioral control, and establishing and maintaining safety for the out-of-control [child] . . ."[16] The use of physical restraint has been widespread in juvenile centers, hospitals, mental institutions, and education agency programs for a long time.[17] But for most schools, restraint is used as a method to prevent injury to a child with disabilities or other children nearby during a time of crisis or in an emergency.[18] Although school personnel claim that physical restraint is used only in emergency situations, there is evidence showing physical restraint is being used for a variety of other reasons including as a response to student noncompliance.[19]

Physical restraint is also used to forcibly move a student into a seclusion room.[20] Seclusion is defined as the "involuntary confinement of an individual alone in a room or area from which the individual is physically prevented from leaving."[21] Many advocacy organizations maintain that seclusion occurs when a child is confined in any room and is prevented from leaving regardless of the "intended purpose or the name applied to this procedure or the name of the place where the student is secluded."[22] In most situations, a child is placed in a room that is locked from the outside, or blocked so that the child is unable to leave.[23] Since seclusion often means a student is left alone in a small room, some may be inclined to believe that a student is less likely to suffer any harm. Although seclusion may cause less physical harm to a child, it subjects the student to greater emotional harm, which for some students has led to suicide.[24] On the other hand, it is important to recognize that seclusion does not include situations where a student makes a "free will" choice to go to a room to be alone and has the ability to leave at any time.[25] These rooms are often called cool-down rooms or

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[16] CCBD Position Summary (Restraint), *supra* note 8, at 4.

[17] *Id.* at 4.

[18] *Id.*

[19] Joseph B. Ryan & Reece L. Peterson, *Physical Restraint in School*, 29(2) J. Couns. for Child. Behav. Disorders 154, 158 (2004).

[20] The Council for Children with Behavior Disorders, CCBD's Position Summary on the Use of Seclusion in School Settings 1 (2009) [hereinafter CCBD Position Summary (Seclusion)].

[21] Kutz, *supra* note 1, at 1. Time-out is a "behavior management technique that is part of an approved treatment program and may involve the separation of the individual from the group, in a non-locked setting, for the purpose of calming." 42 U.S.C. §§ 290ii(d)(4) and 290jj(d)(5). A time-out may be considered a form of seclusion if it is so restrictive the student is prevented from leaving. CCBD Position Summary (Seclusion), *supra* note 20, at 3.

[22] CCBD Position Summary (Seclusion), *supra* note 20, at 1.

[23] *Id.*

[24] *See* King v. Pioneer Reg'l Educ. Serv. Agency, 688 S.E.2d 7 (Ga. Ct. App. 2009). Jonathan King was a thirteen-year-old boy in Georgia. He had been placed in a seclusion room and checked on at fifteen-minute intervals. Even though Jonathan was suicidal and claustrophobic, he was still secluded. While in the room, Jonathan took the rope (given to him by the school because he was not wearing a belt) from his waist and hung himself. *Id.*

[25] CCBD Position Summary (Seclusion), *supra* note 20, at 2.

safe places and are not seclusion.[26]

B. Purpose of Restraint and Seclusion, and Why Teachers are Reluctant to Abandon These Techniques

In most circumstances, teachers and other staff members believe that it is necessary to restrain or seclude a child "in order to protect them from harming themselves or others."[27] Professionals insist that the purpose of physical restraint is to control student behavior in an emergency situation.[28] The use of restraint is also used to prevent damage to physical property.[29] And as more students with emotional or behavioral disorders are relocated into a general education classroom, rather than a special education classroom, the use of physical restraint is moving with them.[30] General education teachers are unfamiliar with students' disorders and behaviors and are reluctant to stop using restraint because they do not know of any other strategy to stop the possibility of harm.[31]

Seclusion is also used as a technique to change a student's behavior. In school settings, seclusion is most often used "as a consequence or punishment for inappropriate behavior for purposes of changing behavior."[32] For example, in a case reported on by the GAO, a seven-year-old female student, diagnosed with Asperger's Syndrome at a public school in California, was secluded in a walled-off area for not doing her school work.[33] There have also been a variety of other reasons that schools have opted to use the seclusion technique. Seclusion may be used to allow the student's emotions to cool down, remove the student from a reinforcing environment, or "provid[e] the teacher relief from managing the student's behavior or non-compliance with adult commands."[34] Although seclusion has come to be used most frequently to correct minor behavior, the majority of professionals believe seclusion should only be used when a student's behavior is out of control or so

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[26] *Id.*

[27] Kutz, *supra* note 1, at 1.

[28] CCBD Position Summary (Restraint), *supra* note 8, at 4.

[29] *Id.*

[30] *See* Ryan & Peterson, *supra* note 19, at 156.

[31] SpecialEdConnection.com, Green Bay, Wis., School Officials Go Beyond State Directive, http://www.specialedconnection.com/LrpSecStoryTool/index.jsp?contentId=6645349.

[32] CCBD Position Summary (Seclusion), *supra* note 20, at 2.

[33] Kutz, *supra* note 1, at 26. The young student was often placed in seclusion for up to 3three hours at a time for refusing to do her work. *Id.*

[34] CCBD Position Summary (Seclusion), *supra* note 20, at 2.

dangerous in the current situation that the student must be removed to protect himself from injury or injury to another student.[35]

These techniques have been used with children in the United States since the 1950s,[36] so schools are reluctant to eliminate the use of restraint and seclusion.[37] Although the Keeping Students Safe Act has passed the House of Representatives, it lacks support from educators and school administrators.[38] A number of education organizations, including the American Association of School Administrators, are lobbying to prevent its passage.[39] Many educators do not want limits placed on the use of restraint or seclusion techniques. Schools especially do not want regulations and requirements passed down by the federal government.[40]

C. How Effective are Techniques Like Restraint and Seclusion at Changing Behavior?

Even though educators insist on continuing to use restraint and seclusion on students with disabilities, little is known about their efficacy.[41] Almost no research has been conducted to confirm any possible advantages of using these techniques.[42] Most professionals support the use of restraint and seclusion in emergency situations to protect the student, or to calm them down, but "[f]ew of the proponents of physical restraint have claimed that the procedure has any therapeutic value in and of itself."[43]

With regard to seclusion, there is also a lack of information regarding the environment of seclusion rooms and whether or not they meet any of the commonly accepted safety standards.[44] There is also a lack of data concerning the amount of time a student spends in a seclusion room.[45] However, the anecdotal evidence available seems to suggest that students spend "longer periods of time in seclusion than

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[35] *Id.*

[36] Ryan & Peterson, *supra* note 19, at 155.

[37] John Kline, House Committee on Education and Labor, Factsheet, http://republicans.edlabor.house.gov/UploadedFiles/factsheet.pdf (2010).

[38] *Id.*

[39] *Id.*

[40] Republican Study Committee, Legislative Bulletin: H.R. 4247, http://rsc.jordan.house.gov/UploadedFiles/LB_030110_H_R_4247.pdf (2010).

[41] Ryan & Peterson, *supra* note 19, at 159.

[42] CCBD Position Summary (Restraint), *supra* note 8, at 7.

[43] Ryan & Peterson, *supra* note 19, at 159.

[44] CCBD Position Summary (Restraint), *supra* note 8, at 6.

[45] *Id.*

would be necessary to meet the stated goal."[46]

Regardless of the lack of research and data, most educational textbooks dealing with the behavior of students with emotional or behavioral disorders suggest that these types of techniques may be "warranted . . . despite the lack of empirical research supporting such claims."[47] On the other hand, there is research that supports the use of proactive positive behavioral plans, rather than the reactive use of restraint and seclusion.[48] According to a study conducted by the Council of Parent Attorneys and Advocates, Inc., seventy-one percent of the 185 cases studied did not use any form of positive behavioral supports as an intervention.[49] Instead, most educators agree that "sometimes teachers need to seclude or restrain children who are at risk."[50]

III. PROBLEMS WITH USING RESTRAINT AND SECLUSION IN A SCHOOL SETTING

The National Disabilities Rights Network documented incidents from all fifty states indicating that students with disabilities were being "abusively pinned to the floor for hours at a time, handcuffed, locked in closets, and subjected to other traumatizing acts of violence."[51] In Atlanta, Georgia, thirteen-year-old Jonathan King hanged himself with a rope in a seclusion room after being locked in the room for several hours.[52] This came only weeks after he threatened to commit suicide.[53] In Wisconsin, a seven-year-old girl died after being held for hours face-down, in a prone restraint, by multiple staff members.[54] Staff members did not realize she stopped breathing until they rolled her over and discovered she had begun to turn blue.[55] In West Virginia, a four-year-old girl was strapped into a chair with "multiple leather straps that

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[46] *Id.*

[47] Ryan & Peterson, *supra* note 19, at 159.

[48] Jessica Butler, The Council of Parent Attorneys and Advocates, Inc., Unsafe in the Schoolhouse: Abuse of Children with Disabilities 3 (2009), *available at* http://www.copaa.org/wp-content/uploads/2010/10/UnsafeCOPAAMay_27_2009.pdf.

[49] *Id.*

[50] Joseph Shapiro, *Report: Discipline Measures Endanger Disabled Kids*, The Two-Way: NPR's News Blog, May, 19, 2009, http://www.npr.org/templates/story/story.php?storyId=104277070.

[51] Kutz, *supra* note 1, at 2. *See generally* National Disabilities Rights Network, School is Not Supposed to Hurt: Investigative Report on Abusive Restraint and Seclusion 13–26, http://www.ndrn.org/images/Documents/Resources/Publications/Reports/SR-Report2009.pdf (2009) [hereinafter School Is Not Supposed to Hurt].

[52] Kutz, *supra* note 1, at 5.

[53] *Id.*

[54] *Id.* at 6.

[55] *Id.*

resembled a 'miniature electric chair.'"[56] She was later diagnosed with post-traumatic stress disorder after the restraint led to bedwetting and frequent temper tantrums.[57] In Oregon, a police officer shot a sixty-five-pound boy with a 50,000-volt Taser gun after the boy locked himself in a classroom during a behavioral outburst.[58] These are only a few examples of what may result from the use of restraint and seclusion.

While conducting its research, the GAO discovered hundreds of allegations of abuse in public and private schools, and as the report was being published, the GAO continued to receive new allegations from parents and advocacy groups.[59] Even though the report "stopped short of calling the incidence of abuse and death widespread,"[60] the GAO obtained data indicating that thousands of public and private school children were restrained and secluded during the previous school year.[61]

The GAO, along with the Council for Children with Behavioral Disorders and many other organizations, has found that there are four main issues raised by the use of restraint and seclusion. First, restraint and seclusion can cause physical and emotional harm, and death.[62] Second, the majority of deaths are caused by the use of prone restraint.[63] Third, children with disabilities are often restrained or secluded even when they do not appear to be physically aggressive or in danger of hurting anyone.[64] Fourth, the majority of teachers and staff members implementing these procedures are not properly trained.[65]

A. Restraint and Seclusion Can Cause Emotional and Physical Harm, and Death

Even children who manage to walk away without any physical harm may remain severely traumatized by the experience.[66] Psychological and psychiatric organizations have come to realize that restraint and seclusion are harmful to children.[67] While some

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[56] *Id.*
[57] Kutz, *supra* note 1, at 11.
[58] School Is Not Supposed to Hurt, *supra* note 51, at 25.
[59] Kutz, *supra* note 1, at 5.
[60] Craig Goodmark, *A Tragic Void: Georgia's Failure to Regulate Restraint & Seclusion in Schools*, 3 J. MARSHALL L.J. 249, 260 (2010).
[61] Kutz, *supra* note 1, at 7.
[62] School Is Not Supposed to Hurt, *supra* note 51, at 13–26.
[63] Kutz, *supra* note 1, at 7.
[64] *Id.*
[65] *Id.*
[66] *Id.* at 1.
[67] *See generally* Wanda K. Mohr et al., *Adverse Effects Associated with Physical Restraint*, Can. J.

psychological effects may be short-term, such as fear and adrenaline rush, constant physical confrontation may lead to long-term effects such as post-traumatic stress disorder.[68] Although there is only anecdotal evidence for these types of psychological effects caused by restraint and seclusion in a school setting, there is no question that these effects have been connected with similar forms of restraint in medical emergencies and physical assaults.[69] Children who have been restrained in mental institutions have reported:

> nightmares, intrusive thoughts, and avoidance responses resulting from their restrained experiences, as well as marked startle responses associated from being held in benign or nonthreatening positions. They also reported painful memories seeing or hearing others being restrained . . . . Five years later they continued to experience intrusive thoughts, recurrent nightmares, avoidance behaviors, startle responses, and mistrust.[70]

In addition, studies show that physical restraint can cause increased psychological harm to children who have experienced prior abuse by other adults.[71]

Students who are forced into seclusion may suffer more psychological harm than those who are restrained. As a result of being secluded, students express a variety of emotional states: "feelings of anger, anxiety, boredom, confusion, embarrassment, depression, humiliation, abandonment, loneliness and sadness, loss of dignity, powerlessness, helplessness, despair and delusion."[72] A study asking students to draw pictures of their seclusion indicated that they saw it as a form of punishment.[73] The pictures showed students crying and calling for help.[74] For some students, the feeling is so unbearable that they have become fearful of small spaces; others have threatened or committed suicide as a result of seclusion.[75]

Restraint and seclusion may also result in physical injury. Children have suffered bruises, scratches, bleeding, and even broken bones.[76] All fifty states use some form of restraint or seclusion in schools. In

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Psychiatry, 48(5) (2003).

[68] CCBD Position Summary (Restraint), *supra* note 8, at 5; *see also* Kutz, *supra* note 1, at 11.

[69] *See* CCBD Position Summary (Restraint), *supra* note 8, at 5.

[70] Mohr et al., *supra* note 67, at 334.

[71] CCBD Position Summary (Restraint), *supra* note 8, at 5.

[72] School Is Not Supposed to Hurt, *supra* note 51, at 15.

[73] *Id.*

[74] *Id.*

[75] King v. Pioneer Reg'l Educ. Serv. Agency, 688 S.E.2d 7 (2009).

[76] School Is Not Supposed to Hurt, *supra* note 51, at 13–26.

Wisconsin, a high-school student's elbow was broken after a teacher placed the student in an "arm-bar," a move he learned in the Marines.[77] An eleven-year-old boy diagnosed with Asperger's Syndrome in South Carolina was frequently subjected to physical restraint against the floor, which in one incident split open his chin.[78] According to one of the allegations reviewed by the GAO, an eight-year-old autistic boy suffered from scratches, bruises, and a broken nose after teachers and staff members used a prone restraint hold on him.[79] In Florida, a boy suffered a spiral fracture to his upper right arm.[80] Students in seclusion have been hurt by electrocution and self-injury due to cutting, pounding on walls and doors, and head-banging.[81] Students have also been denied food, water, and access to toilets while in seclusion.[82]

Unfortunately, for a number of families, the use of restraint and seclusion has even led to death. There has also been one confirmed case of suicide in seclusion, as well as other reports of students attempting suicide while in seclusion.[83] The GAO identified at least twenty cases in which the use of restraint resulted in death.[84] The Child Welfare League of America has estimated that "between 8 and 10 children in the U.S. die each year due to restraint procedures."[85]

B. Prone Restraint is the Most Dangerous Form of Restraint

The GAO report found that restraints in which a child is held face-down can be deadly.[86] Physical restraint is a dangerous technique that involves "physical struggling, pressure on the chest, or other interruptions in breathing," and has led to the suffocation of some young children.[87] In addition, all national disability organizations have identified prone restraint[88] as the most dangerous form of restraint that

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[77] *School Is Not Supposed to Hurt*,[77] *Id.* at 16.
[78] *School Is Not Supposed to Hurt*, *Id.* at 25.
[79] Kutz, *supra* note 1, at 6.
[80] School Is Not Supposed to Hurt, *supra* note 51, at 20.
[81] CCBD Position Summary (Seclusion), *supra* note 20, at 4.
[82] *Id.*
[83] *Id.*
[84] Kutz, *supra* note 1, at 8.
[85] The Child Welfare League of America, Fact Sheet: Behavioral Management and Children in Residential Care, http://cwla.org/advocacy/secresfactsheet.htm (1998).
[86] Kutz, *supra* note 1.
[87] *Id.* at 1.
[88] Prone restraint is when a person is pinned down face-down; supine restraint is when a person is held down face-up. In both situations, the "maneuver . . . places pressure or weight on the chest, lungs, sternum, diaphragm, back, neck, or throat." CCBD Position Summary (Restraint), *supra* note 8, at 13.

can be used on a child.[89] Children are more vulnerable than adults and are at a greater risk of injury.[90] According to the Hartford Courant Investigation, forty percent of all deaths caused by physical restraint are a result of asphyxiation.[91] The investigation found 142 deaths caused by physical restraint in mental institutions,[92] which have strict restraint regulations and trained medical staff.[93]

Of the ten closed cases examined by the GAO, three of them resulted in death caused by the use of prone restraint in a school setting.[94] In the first case, a fourteen-year-old boy with a history of disruptive behavior was pinned down to the ground by two staff members.[95] After twenty minutes, the boy lost consciousness and CPR was administered.[96] The boy was later pronounced dead as a "result of a brain injury sustained as a result of lack of oxygen due to the compression of the student's chest."[97]

The second case also involved a fourteen-year-old male from Texas. The child feared not being able to eat and often hoarded food as a result of prior abuse by his biological parents.[98] The day he died, he was denied lunch, and around 2:30 in the afternoon he became agitated.[99] The 129-pound boy was pinned to the ground by a 230-pound teacher.[100] Medical examiners determined that the boy's cause of death was "mechanical compression of the trunk."[101]

The third case involved a fifteen-year-old boy on the first day of school.[102] He suffered a seizure while in class, but the school's assistant

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[89] Goodmark, *supra* note 60, at 255.

[90] Kutz, *supra* note 1, at 1.

[91] Mohr et al., *supra* note 67, at 331 (2003).

[92] *Id.*

[93] CCBD Position Summary (Restraint), *supra* note 8, at 5–6.

[94] Kutz, *supra* note 1, at 8. There were actually four cases that resulted in death from the use of physical restraint that restricted the child's breathing. Case 3 in the GAO report involved an eleven-year-old who was committed to a state operated facility in New York for children with developmental disabilities, not in a school setting. While on a field trip, the boy got out of his seat and began grabbing another student. An aide, trying to control the boy sat on him causing the boy to lose consciousness and to stop breathing. *Id.* at 17.

[95] *Id.* at 15.13. The boy weighed 125 pounds and the two men weighed 195 pounds and 155 pounds. *Id.*

[96] *Id.* at 13–14.

[97] *Id.*

[98] *Id.* at 15. The young boy was removed from his family at the age of nine after reports of being neglected and emotionally and physically abused. He suffered from post-traumatic stress disorder, conduct disorder, oppositional defiance disorder, attention deficit hyperactivity disorder, and narcissistic personality disorder. As a child he would try to find food by digging it out of the trash. *Id.*

[99] Kutz, *supra* note 1, at 16.

[100] *Id.*

[101] *Id.*

[102] *Id.* at 19.

principal decided that medical attention was not necessary.[103] Approximately ten minutes later, the child started flailing his arms and screaming,[104] and two aides held him in a full restraint face-down on the floor for approximately one hour.[105] After over thirty minutes of CPR, the boy was transported to the hospital, where he was pronounced dead.[106] The official cause of death was listed as "prolonged physical restraint in prone position associated with extreme mental and motor agitation."[107]

In most cases, educators claim prone restraint is used to protect children who are physically aggressive or are in danger of hurting themselves or others. There is an increased risk of respiratory compromise while trying to subdue or restrain an uncooperative person.[108] While the teachers were properly trained in some of these cases, the result was still the same. Prone restraint is inappropriate and dangerous, especially since the majority of those in the education profession are not trained to properly administer any form of restraint. Regardless of the possible dangers, educators continue to restrain defenseless children who are not physically aggressive.[109]

C. Restraint is Disproportionately Used against Young Children and Usually When the Child is not Physically Aggressive

Most people inaccurately believe that restraint and seclusion are used against older kids in high school, who can be more physical and aggressive. However, only fourteen percent of all restraint and seclusion incidents involve people over the age of fourteen.[110] Fifty-three percent of all incidents are against children between the ages of six and ten.[111] In fact, the younger the child, the more frequent the use of restraint.[112] Of the 185 reports of restraint and seclusion collected over a short two-

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[103] *Id.* at 20.

[104] Kutz, *supra* note 1, at 20.

[105] *Id.*

[106] *Id.*

[107] *Id.* at 21.

[108] Protection & Advocacy, Inc., The Lethal Hazard of Prone Restraint: Positional Asphyxiation, http://www.disabilityrightsca.org/pubs/701801.pdf (2002).

[109] In Wisconsin a 7 year-old girl was placed in a prone restraint position for "blowing bubbles in her milk." School Is Not Supposed to Hurt, *supra* note 51, at 14.

[110] Butler, *supra* note 48, at 4.

[111] *Id.*

[112] Abigail Donovan et al., *Two-Year Trends in the Use of Seclusion and Restraint Among Psychiatrically Hospitalized Youths*, 54 Psychiatric Services 987, 990 (2003).

month period, 68% of the children had autism or Asperger's Syndrome.[113] Furthermore, 27% of those diagnosed with attention deficit hyperactivity disorder (ADHD) were being restrained or secluded.[114]

Nine out of ten cases considered by one study involved children with disabilities or a history of troubled behavior.[115] Restraint and seclusion are not meant to be exclusively used on those with disabilities, but "children with disabilities are being victimized"[116] at a much higher rate than any other group of children in the nation's public and private schools.[117]

Students with autism or ADHD are the most likely to be restrained and secluded, even when they are not physically aggressive.[118] For example, a nine-year-old boy was secluded in a small room seventy-five times over the course of six months for "whistling, slouching, and hand waving."[119]

D. Teachers and Staff Members Lack the Necessary Training Needed to Implement Physical Restraint and Seclusion Procedures

The use of restraint and seclusion are heavily regulated in other professional fields. Medical, psychiatric, and law enforcement agencies have strict guidelines that govern the use of physical restraint.[120] Unfortunately, education is the only field that does not currently require any form of regulation or guideline when it comes to implementing restraint and seclusion.[121] Unlike other professional agencies using restraint or seclusion, there are no accreditation requirements or any other form of federal legislation regulating restraint or seclusion implementation for public or most private schools.[122]

In the GAO report, it was discovered that teachers and other staff

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[113] Butler, *supra* note 48, at 5.
[114] *Id.*
[115] Kutz, *supra* note 1, at 8.
[116] Shapiro, *supra* note 50.
[117] *See* Kutz, *supra* note 1, at 5 ("Almost all of the allegations we identified involved children with disabilities.").
[118] Kutz, *supra* note 1, at 8.
[119] *Id.*
[120] Ryan & Peterson, *supra* note 19, at 155.
[121] *Id.*
[122] Joseph B. Ryan et al., Reducing the Use of Seclusion and Restraint in a Day School Program 204, http://66.147.244.209/~tashorg/wp-content/uploads/2011/01/Reducing-RS-in-Day-School-Program-Ryan__et-al.pdf (2007).

members involved in restraint and seclusion incidents were often untrained.[123] In one of the incidents evaluated, staff members admitted they were inadequately trained.[124] In another incident, a substitute teacher never even received a copy of the school's policy on restraint and seclusion.[125] However, even when staff members received training, it was not enough to prevent the death of a child with a disruptive history.[126]

As more and more students with behavioral disorders and disabilities move out of special day programs and into general education classrooms, their teachers are no longer receiving special training to effectively handle these children; instead, teachers are receiving generic special education training.[127] Furthermore, not only are students with disabilities moving into general education classrooms, but restraint and seclusion techniques are following them.[128] As a result, teachers have "limited to no training or experience with severe behavior disorders or the issues involved in employing physical restraint procedures."[129] Training in such intervention techniques is critical in preventing a student's behavior from escalating to dangerous levels.[130] In addition, since school personnel are not properly trained, staff members usually choose physical restraint or seclusion as their first response to verbal threats, threatening gestures, or intimidating behaviors.[131] Instead of using restraint, school staff members should be trained in "effective behavior interventions that are necessary for the prevention of emotional outbursts typically associated with students who have severe behavior problems."[132]

Unfortunately, states do not require school personnel to be trained in the use of effective behavior intervention or the appropriate use of restraint and seclusion techniques.[133] Of the fifty states, only seventeen require selected staff members administering restraint and seclusion to receive some training, and only one of these seventeen requires training after restraint has already been used.[134] Only five states require staff

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[123] *See* Kutz, *supra* note 1, at 9.
[124] *Id.*
[125] *Id.*
[126] *Id.* at 10.
[127] CCBD Position Summary (Restraint), *supra* note 8, at 7.
[128] Ryan & Peterson, *supra* note 19, at 154.
[129] CCBD Position Summary (Restraint), *supra* note 8, at 7.
[130] Ryan & Peterson, *supra* note 19, at 204.
[131] CCBD Position Summary (Restraint), *supra* note 8, at 7.
[132] *Id.* at 5.
[133] *See* Kutz, *supra* note 1, at 33–58.
[134] *See id.* Out of these seventeen states, the majority of them do not provide much guidance for how much training is necessary, or when training needs to be renewed. Under Texas law, it is acceptable for a staff member to be trained within thirty days after restraint was already administered. *See id.*

members to be trained in de-escalation or other behavior intervention techniques.[135]

In its *Summary of Seclusion and Restraint Statutes, Regulations, Polices, and Guidance, By State and Territory*, the Department of Education collected information regarding each state's current laws regulating the use of restraint and seclusion. In Alaska, although there is no legal regulation for teacher training, statistical data from 2007 to 2009 shows that less than fifty percent of school staff received more than two hours of training, and the other fifty percent received between zero to two hours of training from 2007 and 2009.[136]

The lack of requirements and guidelines in the educational field are a direct cause of the increased susceptibility of misunderstanding, improper implementation of these techniques, and abuse.[137] Without the necessary regulations and guidelines, restraint and seclusion become even more harmful and dangerous. On the other hand, when staff members are appropriately trained in effective behavior interventions, de-escalation, and the implementation of restraint and seclusion, the overall use and danger of restraint and seclusion can be reduced dramatically.[138]

Although Michigan does not have a law regulating training, the Michigan Department of Education drafted and implemented standards for the use of emergency restraint. *See* Mich. Dep't of Educ., Office of Special Educ. and Early Intervention Servs., Supporting Student Behavior: Standards for the Emergency Use of Seclusion and Restraint 4 (2006).

[135] *See* Kutz, *supra* note 1, at 33–58. Connecticut, Iowa, Massachusetts, Nevada, Oregon, Rhode Island, and Texas require teachers to receive training in other forms of intervention and training including: de-escalation, prevention techniques, methods of evaluating the risk of harm in individual situations, the simulated experience of administering and receiving, restraint, alternatives to restraint, crisis prevention techniques, safety, effectiveness of restraint and seclusion, types of restraint, differences between life-threatening restraints and other types of differences between permissible restraints and pain compliance techniques. *See id.*

[136] United States Dep't of Educ., Summary of Seclusion and Restraint Statutes, Regulations, Policies and Guidance, By State and Territory 14 (2010) [hereinafter Summary of Seclusion and Restraint Statutes], *available at* http://www2.ed.gov/policy/seclusion/summary-by-state.pdf.

[137] CCBD Position Summary (Seclusion), *supra* note 20, at 5.

[138] *See generally* Ryan et al., *supra* note 123.

IV. UNREGULATED USE OF RESTRAINT AND SECLUSION IN THE UNITED STATES

A. Inadequate State Laws

Without federal legislation, states are left to deal with the issue of regulating restraint, seclusion, and teacher training on their own. As a result, the laws regarding the use of restraint and seclusion are widely divergent from state to state.[139] There are nineteen states that have no regulation or guidelines for either restraint or seclusion.[140] Some of these nineteen states do have guidelines provided by the state's department or board of education, but many of these guidelines are limited to simple definitions or physical requirements of a seclusion room, or they lack enforcement or some sort of monitoring element.[141] The remaining thirty-one states have laws regulating the use of restraint and seclusion, but these laws also vary widely.[142] Approximately seven states have some restrictions only on the use of restraint, but do not regulate the use of seclusion.[143] Only eight states ban prone restraint (or any other form of restraint that may impede a child's ability to breathe), even though prone restraint has been determined by the GAO to be the most deadly form.[144] With regard to parent notification, only thirteen states require a school to get any form of consent from a parent before using these techniques, and only nineteen states require schools to notify parents after restraint or seclusion has been used.[145] After the publication of the GAO report and the introduction of the Keeping All Students Safe Act in Congress, many states have taken steps to create guidelines for schools to follow.[146]

Texas and California are the two states with the most stringent laws regulating the use of restraint and seclusion, and they both require

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[139] Kutz, *supra* note 1, at 3.

[140] *Id.* at 4.

[141] *See generally* Summary of Seclusion and Restraint Statutes, *supra* note 137.

[142] *See* Kutz, *supra* note 1, at 4.

[143] *Id.* at 4 n.5; *see id.* at 33–58.

[144] *Id.* at 4 n.10. Since the GAO report was published, many disability organizations have successfully lobbied to change their respective state laws, but this is a long process. Very few states have successfully changed their laws, but for those that have been successful in any change it has been the elimination of prone restraint.

[145] *Id.* at 4 n.7–8.

[146] *See generally* Summary of Seclusion and Restraint Statutes, *supra* note 137.

schools and districts to report every incident of restraint or seclusion.[147] Over one-fifth of the nation's children live in these two states,[148] and during the 2007–2008 academic year, Texas and California reported a combined total of 33,095 instances of restraint and seclusion.[149]

The Texas Education Code now explicitly bans the use of seclusion by any school district employee,[150] and allows the use of restraint only in an emergency.[151] Under the Texas Administrative Code, emergency is defined as a situation that poses an "(A) imminent, serious physical harm to the student or others; or (B) imminent, serious property destruction."[152] In addition to limiting restraint to only emergency situations, Texas also places specific restrictions on the techniques and procedures that must be followed if restraint is to be used:

> (1) Restraint shall be limited to the use of such reasonable force as is necessary to address the emergency.
>
> (2) Restraint shall be discontinued at the point at which the emergency no longer exists.
>
> (3) Restraint shall be implemented in such a way as to protect the health and safety of the student and others.
>
> (4) Restraint shall not deprive the student of basic human necessities.[153]

However, even with these stringent laws and regulations, the state of Texas averages over 18,000 incidents of restraint each year.[154] Approximately 45% of these incidents involve students with emotional disorders even though these students only make up 0.3% of the population. Additionally, 25% are students identified with autism, even

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[147] Kutz, *supra* note 1, at 4, 7. California, Connecticut and Texas are required to keep reports on the total number of restraint and seclusion incidents in their respective states. *Id.* at 7. However, other states including Kansas, Pennsylvania, and Rhode Island also collect some type of information. *Id.*

[148] *See generally* Children's Defense Fund, Children in the States Factsheet, *available at* http://www.childrensdefense.org/child-research-data-publications/data/state-data-repository/children-in-the-states-factsheets.html (2009) [hereinafter Children in the States Factsheet].

[149] Kutz, *supra* note 1, at 7.

[150] Tex. Educ. Code Ann. § 37.0021(c) (Vernon 2006).

[151] *Id.* § 37.0021(f).

[152] 19 Tex. Admin. Code § 89.1053 (2007).

[153] *Id.* § 89.1053(c)(1)–(4).

[154] During the 2007–2008 academic year, there were 18,741, in 2008–2009 there were 18,133, and the most recent data for the 2009–2010 school year shows there were 18,542 incidents of restraint in the state of Texas. Data collected by Advocacy Inc., Austin, TX and provided by Senior Attorney Steve Elliot.

though they make up only 8.8% of the population.[155] The most recent data shows that in some school districts, the highest rate of restraint is twenty-four times per child in a single academic year.[156]

The California State Education Code explicitly bans locked seclusion and any "device or material or object [that] simultaneously immobilizes all four extremities."[157] But like Texas, California does allow the use of emergency intervention against students with disabilities if, and only if, "it is used to control unpredictable, spontaneous behavior which poses a clear and present danger of serious physical harm to the individuals or others."[158] In order to use restraint to control unpredictable and spontaneous behavior, it must be a situation that "cannot be immediately prevented by a response less restrictive than the temporary application of a technique used to contain the behavior" of the student.[159] Furthermore, the use of force cannot "exceed that which is reasonable and necessary under the circumstances."[160] In a recent notification sent to all school districts, charter schools, and special education schools, the director of the Special Education Division of California added additional guidelines, including a ban on "any intervention designed to, or likely to, cause physical pain." However, this same policy update maintained the use of prone restraint in an emergency situation by a trained staff member.[161]

Even though California still allows prone restraint, its regulations and restrictions are more stringent than most states with regard to restraint and seclusion. Yet, these restrictions have not eliminated or reduced the use of restraint in California. During the 2007–2008 academic year, California reported 14,354 instances of students being restrained, secluded, or otherwise subjected to "emergency interventions."[162] According to the most recent numbers, during the 2009–2010 academic school year, California reported over 21,000 incidents of restraint and seclusion.[163] The stringent regulations in California have not decreased the number of incidents of restraint or

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[155] *Id.*

[156] *Id.*

[157] 5 Cal. Code Regs. § 3052(i)(4)(B) (2011).

[158] *Id.* § 3052(i).

[159] *Id.*

[160] *Id.* § 3052(i)(4)(C).

[161] California Department of Education, Special Education Division Memorandum, Official Message from State Director of Special Education, November 8, 2007.[161] California Department of Education, Procedures for Serious Behavior Problems, *available at* http://www.cde.ca.gov/sp/se/lr/oml10707.asp (2007).

[162] Kutz, *supra* note 1, at 7.

[163] Colleen Shaddox, *Use Of Student Restraints, Seclusions Tops 18,000*, Connecticut Health I-Team, Dec. 6, 2010, *available at* http://newhavenindependent.org/index.php/health/entry/restraints_story.

seclusion (even though seclusion in a locked room is banned); California has been slow to make any adjustments or changes to its current law even after the publication of the GAO report.[164]

In both Texas and California, the stringent laws have not been able to protect children from the harms and dangers of restraint and seclusion. In Northern Texas, a first grader with severe emotional behavior issues stemming from a history of sexual abuse was restrained by her teacher.[165] During the multiple incidents of restraint, the teacher sat on the student, wrapped her in a sheet, and duct-taped her. The principal taped the child's mouth with gauze, and eventually the child was wrapped in a blanket and taped to a cot in the office.[166]

According to the investigative report by Disabilities Rights California,[167] schools in California not only have a large number of reported restraints and seclusions, there are incidents in which schools have clearly broken the law. In a special day classroom, an eight-year-old boy with ADHD and mild retardation was placed in a locked seclusion room whenever he became "noncompliant, aggressive, or disruptive."[168] This intervention violated California state law and was inconsistent with the standards of using locked seclusion.[169] In addition to the numerous reports of seclusion and restraint, Disabilities Rights California has learned of over thirty-nine incidents of death due to seclusion or behavioral restraint in the past decade.[170]

Connecticut requires reporting the use of restraint and seclusion, but its laws are not nearly as stringent as those in Texas or California. Connecticut bans the use of prone restraint or any restraint that may restrict the flow of air into a person's lungs.[171] Connecticut allows restraint and seclusion to be used as an emergency intervention designed to prevent immediate or imminent injury to the person at risk or others.[172] Restraint and seclusion cannot be used as disciplinary measures, for the convenience of the staff member, or in circumstances where there is a less-restrictive alternative.[173] Additionally, all providers and assistant providers must be trained in the use of physical restraint, de-escalation techniques, and other prevention strategies.[174]

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[164] *See* Summary of Seclusion and Restraint Statutes, *supra* note 137, at 23–24.
[165] Doe v. S&S Consol. I.S.D, 149 F. Supp. 2d 274, 279–81 (E.D. Tex. 2001).
[166] *Id.* at 279–80.
[167] Disabilities Rights California was formerly known as California Protection & Advocacy, Inc.
[168] Protection & Advocacy, Inc., Restraint and Seclusion in California Schools: A Failing Grade (2007) [hereinafter Restraint and Seclusion in California Schools].
[169] *Id.*
[170] *Id.*
[171] Conn. Gen. Stat. § 46a-151 (1999).
[172] *Id.* § 46a-152.
[173] *Id.*
[174] *Id.*

Although Connecticut law seems to focus more on preventive measures, it does not provide specific regulations regarding the use of these techniques.[175] Though much smaller than Texas, Connecticut has reported over 18,000 incidents of restraint and seclusion against school children.[176] Connecticut law only requires schools to report emergency interventions, not planned interventions available for special education students as part of their behavior plans.[177]

The use of restraint and seclusion remains staggeringly widespread, but without data from states that lack legal regulation, it is difficult to come to any clear conclusions. However, if states like Texas, California, and Connecticut are still experiencing high restraint rates, it is not hard to believe that there would be even higher rates of restraint and seclusion in states where no regulation exists. It is also important to recognize that all of the data collected is only that which gets reported by the staff members using restraint and seclusion interventions.

B. Judicial Decisions: Protection for School Districts, Schools, and Educators

The lack of state laws and the inconsistency from state to state have given additional protections to school districts, schools, educators, and other school personnel from being held responsible for the harm, serious injury, or death of a child while at school. As the number of incidents involving restraint and seclusion remains high, parents and attorneys are trying to find new ways to attack the problem. Over the past two decades, there have been hundreds of cases brought by parents or guardians against school districts or teachers who have used restraint against a child and caused some type of harm. Advocacy organizations have taken on cases against these school districts and educators under various laws including the Individuals with Disabilities Education Act (IDEA), section 504 of the Americans with Disabilities Act (ADA), the Fourteenth Amendment, and the Fourth Amendment's protection from unreasonable searches and seizures. Many of these arguments have turned out to be fruitless in the judicial branch. School districts, schools, and educators are not only being protected from liability, but in some cases the child has been held liable for harming a public servant who uses a restraint intervention.[178]

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[175] *See generally id.*

[176] Shaddox, *supra* note 164.

[177] *Id.*

[178] In *In re P.N.*, a fourth grader was diagnosed with severe emotional disorder. While being

1. *Individuals with Disabilities Education Act*

One of the most common claims made against school districts by families who have children with disabilities is that the school district or school personnel violated IDEA. IDEA ensures that all disabled children receive a free appropriate public education ("FAPE") that is designed to meet the needs of each individual child.[179] States have the "primary responsibility for developing and executing education programs" for children with disabilities, but IDEA "imposes significant requirements to be followed in the discharge of that responsibility."[180] As part of IDEA, Congress also provided procedural safeguards, which are intended to permit parental involvement in their child's education.[181] In addition, if a parent is unsatisfied with a child's Individual Education Plan ("IEP")[182] or the services being provided, then IDEA allows "parents to obtain administrative and judicial review."[183] The party unsatisfied with the outcome of the hearing process may then file a law suit in state or federal court.[184]

If a party chooses to file under IDEA, there are several procedures and requirements that must be met in order to have a successful claim. First, the party may only file suit against the school district in which they are currently enrolled.[185] The party must exhaust all administrative remedies, unless the party can show that exhausting these remedies would be futile.[186] Finally, the party must show the school district failed

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restrained due to his behavior, P.N. struggled to get away and kicked Dunlap, the person trying to restrain him. The State filed a petition against P.N. alleging that he had engaged in delinquent conduct by committing the offenses of assault on a public servant. The Texas Penal Code provides that "a person commits an offense if the person . . . intentionally, knowingly, or recklessly causes bodily injury to another," which constitutes "a felony of the third degree if the offense is committed against . . . a person the actor knows is a public servant while the public servant is lawfully discharging an official duty." Tex. Penal Code § 22.01 (Vernon 2009). The court held that since P.N. was trying to get away from Dunlap, he had knowledge that his kick would cause Dunlap to fall over. Dunlap was a public servant; and the use of a "bear hug" restraint by Dunlap was a lawful discharge of his official duties. *In re P.N.*, 2006 WL 2190577 (Tex. App.—Austin 2006).

[179] 20 U.S.C. § 1400(d)(1)(A) (2010).

[180] Schaffer v. Weast, 546 U.S. 49, 52 (2005) (quoting Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 183 (1982)).

[181] C.N. *ex rel.* J.N. v. Willmar Pub. Schs, Indep. Sch. Dist. No. 347, 591 F.3d 624, 630 (8th Cir. 2010).

[182] An Individual Education Plan is a detailed written statement approved by a multidisciplinary team including general and special education teachers, service providers, parents and the child. The document summarizes the student's abilities, outlines the goals for the child's education and specifies the services that the child will receive. *See* Vicky M. v. N.E. Educ. Intermediate Unit 19, 486 F. Supp. 2d 437, 452 (M.D. Penn. 2007).

[183] *C.N.*, 591 F.3d at 630.

[184] *Id*; *see also* 20 U.S.C. § 1415(b)(6), (f), (i)(2)(A).

[185] *See, e.g.*, Thompson v. Bd. of the Special Sch. Dist. No. 1, 144 F.3d 574, 578–79 (8th Cir. 1998).

[186] *See, e.g.*, McCormick v. Waukegan Sch. Dist. No. 60, 374 F.3d 564 (7th Cir. 2004).

to comply with IDEA and the child was denied a FAPE, depriving the child of educational benefits.[187] Unfortunately, these procedural safeguards and requirements have become more like procedural obstacles that provide additional protections for school districts and their teachers.

Parents who wish to bring a lawsuit against a school district will have a difficult time winning under IDEA. According to the Eighth Circuit, a request for a due process hearing is not only meant to be a safeguard for the parents, but it also provides notice to the school district of the perceived problem.[188] Therefore, the school district will have the opportunity to address any alleged problems.[189] In *C.N. v. Willmar Public School District*, the child, C.N., was moved to a new school district before her parents requested a due process hearing.[190] Even though there was evidence of C.N. being restrained, placed in seclusion, denied use of the bathroom, and being verbally abused by her teacher while attending school in Willmar Public School District, her IDEA claims were dismissed by the district court for failure to request a hearing prior to moving school districts.[191] Due to further obstacles created by individual states, a district court held that C.N. was required to request the due process hearing while in the Willmar Public School District because the hearing must be held in the "district responsible for ensuring that a free appropriate public education is provided."[192] If a person does not request a due process hearing to challenge educational services, then the party's right to challenge will not be preserved and becomes moot since a new school district is responsible for providing a due process hearing.[193]

It is nearly impossible to get around these additional requirements placed on parties by various states. On appeal, C.N. tried to argue, notwithstanding the failure to request a hearing before leaving the district, that the claim should not be dismissed because C.N. needed to be immediately transferred to protect her physical and psychological safety.[194] However, the court refused to extend any sort of protection to the families. Based on precedent, the court chose to dismiss the case.[195]

Before switching school districts, C.N.'s parents tried to discuss

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[187] L v. N. Haven Bd. of Educ., 624 F. Supp. 2d 163, 178 (D. Conn. 2009); *see also* 20 U.S.C. § 1415(f)(3)(E)(ii)(I)–(II) (2005).
[188] *C.N.*, 591 F.3d at 631.
[189] *Id.*
[190] *Id.*
[191] C.N. *ex rel.* J.N. v. Willmar Pub. Schs., I.S.D. No. 347, 2008 WL 3896205, at *3–4 (D. Minn. Aug. 19, 2008).
[192] *Id.*
[193] *Id.*
[194] *C.N.*, 591 F.3d at 631.
[195] *Id.* at 632.

the possibility of C.N.'s teacher returning and C.N. remaining with Willmar Public School.[196] Plaintiffs relied on a previous Eighth Circuit case, in which a student was verbally harassed and physically assaulted.[197] The parents tried to engage in informal discussion to solve the problem.[198] During these informal discussions the child was still subjected to the "intolerable situation," and the court held that because the parents waited to request a due process hearing until after switching schools, their case must be dismissed.[199] Based on both of these cases, it seems that courts will not allow a plaintiff to bring a claim after taking the child out of the school unless she was in such immediate danger that the parent could not solve the problem. If there is such a severe problem, the parent must request a due process hearing as soon as possible. Otherwise, the delay caused by switching of districts is enough to prevent a party from bringing an IDEA claim against the school district.

To further complicate matters for families in need of protection against school districts abusing restraint and seclusion interventions, the IDEA requires a party disputing an IEP to exhaust all administrative remedies before filing in state or federal court.[200] In every district in the United States, IDEA claims continue to be dismissed for failure to exhaust administrative remedies, regardless of the claim's validity. If a party makes a claim that could possibly be "redressed to any degree by the IDEA's administrative procedures and remedies," then the aggrieved party must exhaust administrative remedies.[201] A party must exhaust administrative remedies unless the court determines that the administrative process would be futile.[202] Once again, the courts have not made this an easy process for parents. A parent will have to show there is no possible remedy that can be provided by the school district to ameliorate the alleged problem. In a Seventh Circuit case, Eron, a student with a disability, was able to show that exhaustion of administrative remedies would be futile for damages sought for the permanent physical injuries he suffered during his physical education class.[203] Eron's complaint asserted that he "suffered permanent physical injuries that [would] reduce the quality of his life—and perhaps even

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[196] *See id.* at 629.

[197] *Id.* at 632; *see also* M.P. v. Indep. Sch. Dist. No. 721, 326 F.3d 975, 977 (8th Cir. 2003).

[198] *C.N.*, 591 F.3d at 632.

[199] *Id.*

[200] *See* 20 U.S.C. § 1415(a), (f) (2005).

[201] McCormick v. Waukegan Sch. Dist. No. 60, 374 F.3d 564, 568 (7th Cir. 2004).

[202] *Id.*

[203] *Id.* Eron was diagnosed with muscular dystrophy in 1992. According to his IEP, Eron was permitted to participate in physical education but could stop if he became winded or felt muscle pain. One of the physical education instructors forced Eron to run laps and perform push-ups. Despite Eron's pleas and informing the teacher of his IEP, the teacher threatened to fail Eron if he did not complete the tasks. *Id.* at 566.

shorten it."[204] Since his claims were not education-related, and no change in his IEP could remedy the problem, the court held that it would be futile for Eron to exhaust the administrative process.[205]

Although Eron was able to show that exhaustion of administrative remedies would be futile, this is not the norm. Most cases will be dismissed for failure to exhaust remedies, or will be dismissed for failure to show that the school or district violated IDEA and failed to provide a free appropriate public education.

Once a party has made it to an administrative hearing or to state or federal court, the parent must be able to show the child was denied a free appropriate public education in the least restrictive environment and was deprived of the educational benefit.[206] This is usually where the majority of restraint and seclusion cases lose in federal court because the courts determine that the child was not denied a free appropriate public education.

In order to show a child was denied a free appropriate public education, the court first determines if the child's IEP was "reasonably calculated to enable the child to receive educational benefits."[207] Unfortunately, in many states where restraint and seclusion techniques are allowed to be included in a child's IEP, parents have a difficult time proving their child was denied a free appropriate public education. When parents consent, these types of emergency interventions become part of the reasonably calculated IEP to bring about educational benefit. Furthermore, an IEP does not have to maximize educational benefit.[208] In order to meet the requirements of IDEA, an appropriate public education is one that is likely to produce progress.[209] Therefore, if the use of restraint or seclusion is offered as a technique to keep the student on task and intended to increase the student's educational benefit, then it is not a violation of IDEA, even if the IEP does not actually produce progress.

Furthermore, teachers have continued to claim that restraint and seclusion, or other similar interventions are required because the child's own behavior is what is impeding their educational benefit. In *L. v. North Haven Board of Education*, L. was a twelve-year-old at the time of the hearing and had Down syndrome.[210] During the 2006–2007 school year, L.'s parents refused to allow the implementation of an IEP which

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[204] *Id.* at 569.
[205] *Id.*
[206] L. v. N. Haven Bd. of Educ., 624 F. Supp. 2d 163, 178, 180 (D. Conn. 2009); *see also* 20 U.S.C. § 1415(f)(3)(E)(ii)(I)–(II) (2006).
[207] *L.*, 624 F. Supp. 2d at 180.
[208] *Id.*
[209] *Id.*
[210] *Id.* at 186.

allowed the school to use a seclusion room when L.'s behavior became out of control.[211] However, the court did not determine that the school had failed to implement a reasonably calculated IEP which provided L. with a free appropriate public education in the least restrictive environment.[212] Instead, the court held that the IEP, with its incomplete behavior plan, could not be implemented because L.'s own behavior significantly impeded her ability to participate in the regular education setting.[213]

In many of the cases brought to court regarding IDEA violations, the use of restraint and seclusion is unlikely to be seen as a violation because, for many schools, it is an intervention justified as a technique aimed at helping the child in the classroom. Unfortunately for many parents and families, IDEA does not create strong enough safeguards to protect children from the use of restraint or seclusion. Or at least it does not provide any safeguards against these techniques as long as they are seen as being likely to increase educational progress.

2. *Americans with Disabilities Act Section 504 Complaints*

Complaints filed under section 504 are very similar to those filed under IDEA. In fact, if a case fails to meet the requirements of IDEA it will also fail to meet the requirements of a section 504 complaint. The courts have determined that a valid IDEA claim is necessary for a section 504 complaint, however, it is not determinative.[214]

There are three requirements of an ADA claim: (1) the party must be disabled; (2) the party was excluded from or denied benefits of a public service, program, or activity; and (3) the party was excluded from, or denied benefits from, the public entity because of his disability.[215] The party must also be able to show that the educational decisions relating to the student were inappropriate and constituted either "bad faith" or "gross misjudgment" to make a successful special education claim under section 504.[216] Furthermore, if a plaintiff is seeking monetary damages, the plaintiff must show the defendants acted with

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[211] *Id.* at 181.
[212] *See id.* at 182.
[213] *Id.*
[214] *See generally* Alex G. *ex rel.* Steven G. v. Bd. of Trustees of David Joint Unified Sch. Dist., 387 F. Supp. 2d 1119 (E.D. Cal. 2005); *see also* C.N. *ex rel.* J.N. v. Willmar Pub. Schs., I.S.D No. 347, 2008 WL 3896205 (D. Minn. Aug. 19, 2008), aff'd, 591 F.3d 624 (8th Cir. 2010).
[215] *Alex G.*, 387 F. Supp. 2d at 1124; *see also* Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2002).
[216] *Alex G.*, 387 F. Supp. 2d at 1124.

deliberate indifference.[217] The least common of these four requirements is that a judicial officer will find that a school district or school teacher made any decision to use restraint or seclusion in bad faith or with deliberate indifference against a student.

In *C.N. ex rel. JN v. Willmar School District*, the district conducted its own investigation into the use of restraint and other allegations of abuse.[218] The investigation only found evidence indicating the teacher denied C.N. the use of the restroom and the incident was attributed to a mere lapse in judgment.[219] Although C.N. did not file a section 504 claim as part of her lawsuit, it is unlikely the court would overrule the school's investigation or a determination from an administrative hearing. The courts are expected to "give due-weight to these proceedings," and are "mindful that the judiciary generally lacks the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy."[220] Additionally, courts are unwilling to overturn a decision made at an administrative hearing or by a school district if a thorough and careful review has already been conducted.[221] Since none of the other allegations were determined to be true in the district's investigation, the allegations of restraint, verbal abuse, and physical abuse against C.N. would likely be given very little weight.

In his case in the Eastern District of California, Alex, a third-grade boy with autism, alleged that he was subjected to multiple incidents of physical restraint by his special education teachers.[222] On two occasions, the special education teachers pinned Alex up against the wall for fear he was going to physically injure himself as he jumped across wet tables.[223] After several other incidents in which Alex seemed uncontrollable, the school district obtained a temporary restraining order against Alex.[224] Alex's parents requested several due process hearings, and the hearing officer found in favor of the district on some issues and in favor of Alex on other issues.[225] When it came to Alex's section 504 claims, the judge was unwilling to find in favor of Alex.[226]

Because many states have laws allowing the use of restraint and seclusion, it is difficult to show in a section 504 claim that the school

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[217] *Id.*
[218] C.N. *ex rel.* J.N. v. Willmar Pub. Schs., Indep. Sch. Dist. No. 347, 591 F.3d 624, 628 (8th Cir. 2010).
[219] *Id.*
[220] L. v. N. Haven Bd. of Educ., 624 F. Supp. 2d 163, 178 (D. Conn. 2009)
[221] *Id.*
[222] *Alex G.*, 387 F. Supp. 2d at 1121.
[223] *Id.* at 1125.
[224] *Id.* at 1123.
[225] *Id.*
[226] *Id.* at 1125–26.

acted in bad faith or with indifference. The district court in California held that it is unclear if the school district's actions against Alex violated any law, "given that the state law explicitly allows school officials to physically restrain students . . . ."[227] Furthermore, even if the restraints cause physical harm, injury, or death to the student being restrained, it is unlikely to be considered as acting in bad faith if the restraint is approved by the district.[228]

Judges are disinclined to provide additional protection for the children who are being restrained in schools. Even when there seems to be an instance of discrimination or retaliation, judges often assume the school district or personnel were acting reasonably. Alex tried to argue the school district was retaliating against him due to his disability by continually restraining him, suspending him, and eventually trying to move him to a different school.[229] However, the district court found that these claims lacked evidence[230] and further stated that the school made a good faith effort to implement an appropriate program for Alex, and was simply protecting other students and staff members from a "disruptive and violent student."[231]

Although section 504 is intended to be another protection for children with disabilities, when courts analyze whether or not a school district acted in bad faith or with deliberate indifference, the courts seem to forget the child has a disability. In *Rasmus v. Arizona*, Charles was an eighth grader with ADHD and was diagnosed as emotionally disabled.[232] Charles was placed in a locked seclusion room for calling another student a name.[233] Although in most schools children without disabilities are almost never secluded for calling another student a name, children with disabilities are often restrained or secluded for such minor infractions. In this case, the court determined that the use of the seclusion room did not violate section 504 because the student was excluded for his own behavior.[234] Additionally, it was only a ten-minute period and Charles was able to return to his classroom and was never denied any benefit.[235]

Like claims filed under IDEA, section 504 claims are difficult to

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[227] *Alex G.*, 387 F. Supp. 2d at 1125.
[228] *See id.*
[229] *See id.* at 1124–25.
[230] *Id.*
[231] *Id.* at 1126–27. In many cases, children are referred to as "disruptive and violent," "menacing," "psychotic," or even "rageful," rather than being described as children with autism, Asperger's, ADHD, or emotional disorders.
[232] Rasmus v. Arizona, 939 F. Supp. 709, 712 (D. Ariz. 1996).
[233] *Id.*
[234] *Id.* at 718.
[235] *Id.*

win in federal court. Thus far, most courts are unwilling to hold a school district or a teacher liable if the state has any law indicating that restraint or seclusion is an acceptable method of intervention. And for those states without laws or regulations, courts have determined that "individual defendants could have objectively believed that their conduct and policies were lawful."[236] Even in a situation where a teacher removed his tie, rolled up his sleeves, physically threatened a student, forced a student to stand up, pushed the student against the wall, and began to choke the student,[237] this was not enough to be malicious or in bad faith.[238] Instead, the court held this was an appropriate action because it was intended to punish the child and was in no way random, malicious, or an unprovoked attack.[239]

With such deference to schools and teachers in cases regarding restraint and seclusion, the misrepresentation of children with disabilities, and the continued protection of school personnel, section 504 claims have continually failed to stop the use of restraint and seclusion techniques.

3. *Fourth Amendment: Illegal Seizure*

Parents of children with disabilities have also tried to bring claims against schools for a violation of their child's right to be free from illegal seizures. The Fourth Amendment is intended to protect against unreasonable seizures, and it has been understood to apply to children in a school setting.[240] As courts have chosen to defer to the teacher's expertise regarding the management and disciplinary techniques used in a classroom, parents have found it difficult to bring a successful illegal seizure claim.[241]

A Fourth Amendment claim alleging illegal seizure must prove that a person was seized and that the seizure was unreasonable.[242] First, a situation is determined to be a seizure when, under the circumstances, a reasonable person would believe he was not free to leave.[243] However, in a school setting, since children are generally not free to leave the school's campus, a child must be able to show the limitation on the

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[236] *Id.* at 719.
[237] Flores v. Sch. Bd. of DeSoto Parish, 116 F. App'x 504, 506 (5th Cir. 2004).
[238] *Id.* at 511.
[239] *Id.*
[240] Couture v. Bd. of Educ. of the Albuquerque Pub. Schs., 535 F.3d 1243, 1255 (10th Cir. 2008).
[241] *Id.*
[242] Rasmus v. Arizona, 939 F. Supp. 709, 713 (D. Ariz. 1996).
[243] *Couture*, 535 F.3d at 1250.

child's freedom of movement significantly exceeded those limitations inherent in the everyday atmosphere of a school.[244] Additionally, after proving a seizure took place, it must then be shown that the seizure was unreasonable and therefore violated the Fourth Amendment. Once again though, in a school setting the "reasonableness standard operates differently."[245] The courts have recognized the "substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that [seizures] be based on probable cause."[246] Instead, the legality of the seizure in a school setting depends on the reasonableness under all the circumstances of the seizure.[247] Therefore, in a school setting a seizure will meet the reasonableness standard if the seizure is reasonably "related to the objectives of the [seizure] and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[248]

In one case, a second grader, M.C., was emotionally disturbed and had various behavior issues.[249] M.C. was often secluded in a "time out" room in order to calm down.[250] Ms. Couture, M.C.'s mother, filed a claim against the school district for violating her son's Fourth Amendment rights.[251] During his time at school, M.C. was placed in seclusion for numerous reasons including not following directions, refusing to complete his spelling test, and behaving aggressively.[252] While in seclusion, M.C. spent between as little as five minutes to at most one hour and forty-two minutes for conduct as minor as not following directions.[253] However, the court found that the seizures were reasonable and the school district did not violate M.C.'s Fourth Amendment right.[254] The court held that it is for the teachers to make a pedagogical judgment at the time, and unless it is blatantly not tailored to meet the child's needs, the teacher's choice will be respected.[255] Furthermore, the court expanded the protection for the use of restraint and seclusion to include ensuring that students follow directions.[256]

In the Fifth Circuit, the court has practically eviscerated all Fourth

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[244] *Id.* at 1251.
[245] *Rasmus*, 939 F. Supp. at 714.
[246] *Id.*
[247] *Id.*
[248] *Id.* (quoting New Jersey v. T.L.O., 469 U.S. 325, 342 (1985)).
[249] *See Couture*, 535 F.3d at 1246–47.
[250] *Id.* at 1247.
[251] *Id.* at 1253–54.
[252] *Id.* at 1247, 1254.
[253] *Id.*
[254] *Couture*, 535 F.3d at 1256.
[255] *Id.* at 1254–55.
[256] *Id.* at 1252.

Amendment claims relating to restraint and seclusion.[257] In 2002, the Fifth Circuit, affirming a district court opinion, redrafted the requirements for a Fourth Amendment claim specifically for a child with disabilities.[258] Instead of simply looking to see if the seizure was reasonable, the Fifth Circuit questioned whether a "disruptive and troubled schoolchild . . . has a clearly established right under the Fourth Amendment to be free from" restraint.[259] The court decided that the Fourth Amendment did not protect the raging child from being wrapped in a blanket and duct-taped to a cot.[260]

As late as 2004, the Fifth Circuit noted that the momentary use of force against a student is "not a scenario to which the Fourth Amendment textually or historically applies."[261] Furthermore, the court recognized that the preservation of order in the schools allows for "closer supervision and control of the school children."[262] The Fifth Circuit continued to say that students are not allowed to bring claims against school personnel for excessive force under the Fourth Amendment.[263] Since school children have a special constitutional status—and momentary seizure is not normally the type of restraint associated with the Fourth Amendment—the Fifth Circuit has declined to recognize claims under the Fourth Amendment for the use of restraint or seclusion.[264]

All states allow the use of some form of restraint and seclusion, so it is unlikely the Supreme Court will ever determine that the use of these techniques is unreasonable. Courts have provided teachers with wide latitude in making decisions as to how to manage and discipline their students.

4. *Fourteenth Amendment Due Process Claims*

Fourteenth Amendment claims are probably the most common claim brought against school districts and personnel. Unfortunately, the Fourteenth Amendment standard is a very high standard to meet.

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[257] *See* Doe v. S&S Consol., 149 F. Supp. 2d 274, 286 (E.D. Tex. 2001), *aff'd*, 309 F.3d 307, 307 (5th Cir. 2002).
[258] *See id.*
[259] *Id.* at 286.
[260] *Id.* at 287.
[261] Flores v. Sch. Bd. of DeSoto Parish, 116 F. App'x 504, 510 (5th Cir. 2004) (quoting Kurilla v. Callahan, 68 F. Supp. 2d 556, 563 (M.D. Pa. 1999)) (internal quotation marks omitted).
[262] *Id.* (citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655–56 (1995)).
[263] *Id.* at 509–10.
[264] *Id.*

According to the Eighth Circuit, "substantive due process is concerned with violations of personal rights . . . so severe . . . so disproportionate to the need presented, and . . . so inspired by malice . . . that it amount[s] to brutal and inhumane abuse of official power literally shocking to the conscience."[265] Therefore, to adequately plead a substantive due process claim, the party must allege that actions by a government official violated a fundamental constitutional right in a way that was shocking to the contemporary conscience.[266]

The Supreme Court has held that a person has a constitutionally protected interest in freedom from bodily restraint.[267] However, to prove that the actions taken by a teacher were beyond negligence—or were so unreasonable to as to shock the conscience—the Court has also held that there is a necessity to balance the "'liberty of the individual' and 'the demands of an organized society.'"[268] Due Process rights can be circumscribed by the need for effective (and often immediate) action by school officials to maintain order and discipline.[269]

Unfortunately, this additional requirement has nearly ensured that claims will fail, because most educators and school personnel argue that their use of restraint and seclusion was for emergency situations, in which a person's physical health was in danger. In *Doe v. S&S Consolidated I.S.D.*, Doe was a first grader who was wrapped in a blanket, duct-taped to a cot, and left there until her mother came to pick her up hours later.[270] This, however, did not reach the point of shocking the conscience because the volatile situation the school faced was a situation that called for immediate action.[271] The school personnel did not intend to harm Doe and tried to ensure her safety.[272] Therefore, the court determined that under the circumstances, the school's actions were not conscience-shocking.[273]

In a similar case in Alabama, D.D. was a four-year-old receiving services for a multitude of disorders including ADHD and Impulse Control Disorder.[274] When D.D. became disruptive in class, his teacher placed him in a Rifton toddler chair.[275] During the incident in question,

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[265] C.N. *ex rel.* J.N. v. Willmar Pub. Schs., Indep. Dist. No. 347, 591 F.3d 624, 634 (8th Cir. 2010) (quoting Flowers v. City of Minneapolis, 478 F.3d 869, 873 (8th Cir. 2007)).
[266] *Id.* at 634
[267] Youngberg v. Romeo, 457 U.S. 307, 316 (1982).
[268] Doe v. S&S Consol. I.S.D., 149 F. Supp. 2d 274, 293 (E.D. Tex. 2001) (quoting *Youngberg*, 457 U.S. at 320).
[269] *Id.* at 293.
[270] *Id.*
[271] *Id.* at 296.
[272] *Id.*
[273] *Doe v. S&S*, 149 F. Supp. 2d at 296.
[274] *D.D. ex rel. Davis v. Chilton Cnty Bd. of Educ,* 701 F. Supp. 2d 1236 (M.D. Ala. 2010).
[275] *Id.* at 1239 (noting that a Rifton chair is generally used as a toddler chair and is meant to be

the teacher used the Velcro straps to keep D.D. in the chair and made him face the wall and wait until his mother came to pick him up from school.[276] Since D.D. was unable to show that the teacher intentionally used force that was obviously excessive and presented a foreseeable risk of serious bodily injury, the court found that the school's actions did not shock the conscience.[277] If a teacher is using physical restraint for safety purposes, and it does not result in serious bodily injury, it is unlikely to shock the conscience.[278]

Furthermore, the courts have upheld the use of restraint and seclusion in some cases by holding that they do not deprive a child of their property interest in education, because these interventions are part of the child's education.[279] In the *Couture* case, the court held that because of M.C.'s age and severe emotional and behavior difficulties, seclusion was actually used as a way to teach self-control and did not deprive him of his right to education.[280]

Even in the most extreme cases, where the state's actions have led to the death of a child, the courts have been reluctant to recognize any protection under the Fourteenth Amendment. In *King v. Pioneer Regional Education Service Agency*, the court found that the school did not violate King's substantive due process rights by placing him in seclusion, where he later committed suicide. King was a thirteen-year-old boy with ADHD and emotional and behavioral issues. In 2004, King was placed in a seclusion room for being disruptive. He was checked on every fifteen minutes by a teacher. During one of the fifteen-minute intervals, King hanged himself with the rope belt the school had given him earlier that day.[281] Since King's death was ultimately caused by "private actors" and not the actions of the state, the court held that the Due Process Clause does not provide any protection.[282]

Even though the Fourteenth Amendment is the broadest claim that one can make, the Fourteenth Amendment Due Process Clause has proven to be yet another failure for those seeking judicial relief. As long as the judicial branch continues to give great deference to the educators and school districts, students who are harmed by the use of restraint and seclusion will not have many protections.

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therapeutic).

[276] *Id.*

[277] *Id.* at 1242.

[278] *See id.*

[279] *See* Couture v. Bd. of Educ. of the Albuquerque Pub. Schs., 535 F.3d 1243, 1257–58 (10th Cir. 2008).

[280] *Id.*

[281] King v. Pioneer Reg'l Educ. Serv. Agency, 688 S.E.2d 7, 12 (Ga. Ct. App. 2009).

[282] *Id.* at 13–14.

C. Lack of Serious Punishment for the Misuse of Restraint and Seclusion

Given the lack of state regulation and judicial support, it is not surprising to know that there have been very few cases which have resulted in some form of repercussion. According to the GAO report, the teachers or staff members involved in five out of the ten cases it evaluated continued either to teach or work in some capacity with children.[283] Since there is no national regulation, it is rather simple for a teacher to transfer to a different state. For example, the teacher responsible for killing a fourteen-year-old boy in Texas, is currently teaching in Virginia, even though the child's death was ruled a homicide.[284] This particular teacher's name was also placed on the Texas registry of individuals found to have abused or neglected children.[285] In another case, an assistant principal who caused the death of a student by using prone restraint is currently a principal at another public school in the same school district.[286]

For many states, the regulations and laws implemented by legislatures or the education department fail to provide any form of punishment for teachers who abuse the use of restraint or seclusion. Based on the Texas statistics, two students in Anna ISD were restrained approximately twenty-four times each during one academic year, which is over twice the average per child in Texas.[287] Unfortunately, no state regulates the overuse of restraint.[288] Teachers will most likely stay at their current placements or move to another school, school district, or even state, without being questioned about their past teaching record.

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[283] Kutz, *supra* note 1, at 9.

[284] *Id.* at 10. Although the death was ruled a homicide, no formal charges were ever brought against the teacher. *Id.*

[285] *Id.*

[286] *Id.*

[287] Data collected by Advocacy, Inc. provided by Senior Attorney Steve Elliot.

[288] *See generally* Kutz, *supra* note 1; Summary of Seclusion and Restraint Statutes, *supra* note 137.

V. KEEPING ALL STUDENTS SAFE ACT, H.R. 4247[289]

A. What is the Keeping All Students Safe Act?

With all of the attention and publicity the GAO report created around restraint and seclusion, along with the increase in news coverage about the serious injuries and deaths caused by these techniques, the Obama administration and Congress have attempted to take some action.

In March 2010, the House of Representatives passed the bill with a vote of 262–153.[290] This new bill would require the Secretary of Education to issue regulations and guidelines for all public and private schools that receive federal funding.[291] This bill is intended to reduce or prevent the use of restraint and seclusion. Furthermore, the bill would ensure that restraint and seclusion are only being used in emergency situations where a student's behavior poses an imminent or immediate danger of physical injury to a student, not to property.[292] Furthermore, the bill makes it clear that restraint and seclusion shall not be used as a disciplinary measure.[293]

The bill would establish policies and procedures to keep all students and staff safe; provide the necessary tools and training to implement these interventions; collect and analyze data; and implement effective preventions and techniques to reduce the use of restraint and seclusion.[294]

In addition, under the bill, all schools would have to meet minimum standards if they choose to use restraint or seclusion techniques.[295] First, under the Act, all schools are prevented from using mechanical restraints, chemical restraints, physical restraints that restrict breathing, or any aversive behavior interventions that compromise the health and safety of a child.[296] Second, the bill allows the use of restraint or seclusion only if other less-restrictive interventions would be ineffective and the child is continually monitored face to face or in continuous direct visual

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[289] The Keeping All Students Safe Act was formerly known as the Preventing Harmful Restraint and Seclusion in Schools Act.

[290] House Vote On Passage: H.R. 4247: Keeping All Students Safe Act, http://www.govtrack.us/congress/vote.xpd?vote=h2010-82. Following passage in the House, the bill moved to the Senate, where it was considered but never voted on.

[291] Legislative Digest, H.R. 4247: Preventing Harmful Restraint and Seclusion Act (2010), *available at* http://www.gop.gov/bill/111/1/hr4247.

[292] Keeping All Students Safe Act, H.R. 4247, 111th Cong. § 3 (2009).

[293] *Id.* § 3(3)(C).

[294] *Id.* § 3(5)(A)–(D).

[295] *Id.*

[296] *Id.* § 1.

contact.[297] The use of restraint and seclusion must "end immediately upon the cessation of the conditions" described in § 5(3)(A) and (B) of this bill.[298] The use of restraint and seclusion cannot be written into a student's IEP or behavioral plan,[299] but it can be part of a school's crisis or safety plan.[300]

In addition to the procedural requirements for the use of these techniques, schools are also required to give parents verbal or electronic notification on the same day of the incident and written notification within twenty-four hours.[301]

To help reduce the number of restraints, a state is required to keep reports of the total number of incidents in an academic year. The state is also required to keep track of other information including resulting injuries, deaths, whether the staff member was trained, and the age and disability status of the student.[302]

Finally, when states do not follow its minimum requirements, the Act provides remedies. Under § 6(c), the Secretary of Education can withhold funds, require the state to implement a corrective plan, or issue a complaint to compel compliance by the state's educational department.[303] When it is determined that the state has met the minimum requirements, the Secretary of Education can release the federal funding to the state.[304]

B. The Keeping All Students Safe Act is a Good First Step

The Keeping All Students Safe Act, although not enacted, is a good first step in the fight against the use of restraint and seclusion. First, it increases the amount of regulation all states are required to have. Second, it gives the national Department of Education a chance to further research this area and to develop new policies to help prevent and reduce the reliance on restraint and seclusion. Finally, the bill provides a better

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[297] Keeping All Students Safe Act, H.R. 4247, 111th Cong. § 5(a)(2)(B), (C) (2009).
[298] *Id.* § 5(a)(2)(E).
[299] This clause of the Keeping All Students Safe Act was later removed during the review by the Senate. Although the Senate has yet to vote on the bill, this change has caused a divide among disability organizations. Some organizations no longer support the bill because they believe this clause adds much needed protection for students with disabilities. *See generally* Michelle Diamente, *Restraint And Seclusion Bill Hits Bumpy Road On Path To Senate*, Disability Scoop, Aug. 3, 2010, http://www.disabilityscoop.com/2010/08/03/restraint-senate-iep/9615.
[300] Keeping All Students Safe Act, H.R. 4247, 111th Cong. § 5(a)(4) (2009).
[301] *Id.* § 5(a)(5)(A).
[302] *Id.* § 6(b).
[303] *Id.* § 6(c).
[304] *Id.*

chance of individuals bringing successful claims against school districts in courts.

The greatest benefit of the Keeping All Students Safe Act is that it forces all states to meet the minimum standards. As already noted in Part IV, the use of restraint and seclusion is widely unregulated in the United States. There are over nineteen states that do not have any form of legal regulation for the use of these interventions. By forcing states to meet minimum requirements, school districts and personnel are forced to be become more conscious of their actions and rethink what steps to take first. If the bill does nothing else, it requires these nineteen states to enact some type of regulation on the use of restraint and seclusion. This is especially helpful with regard to the use of prone restraint or other restraints that block a child's airways. The GAO found this to be the most deadly form of restraint, but only eight states have banned its use. The new bill would effectively ban its use in all public and private schools across the country.[305]

Another area that is in greater need of regulation is the requirement of teacher training.[306] A study conducted from 2002 to 2004 determined that the more training a teacher receives, the less likely restraint or seclusion will be used.[307] In the study, all staff underwent extensive training in conflict de-escalation using therapeutic intervention, and participated in crisis-prevention training.[308] During the 2002–2003 school year, prior to training, there were 439 incidents of restraint and seclusion. Following the 2003–2004 year, in which all staff members were trained, the school had just 266 incidents of restraint and seclusion.[309] Restraint incidents decreased by almost forty percent and seclusion incidents were reduced by thirty-four. Requiring all states to train staff members who might use restraint or seclusion can immediately decrease the number of incidents. More importantly, under the bill, staff members are not only required to learn procedural techniques, they are also required to be trained in alternative interventions.[310]

Another benefit of the new bill is that it requires the Department of Education to keep an assessment of how states are performing.[311] The GAO report collected a lot of information in a short amount of time. Unfortunately, the GAO was unable to do research on all aspects of restraint and seclusion and only focused on a handful of incidents.

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[305] Keeping All Students Safe Act, H.R. 4247, 111th Cong. § 5(a)(1)(D) (2009).
[306] *Id.* § 5(a)(2)(D)(1).
[307] Ryan et al., *supra* note 122, at 212.
[308] *Id.* at 207.
[309] *Id.* at 209.
[310] Keeping All Students Safe Act, H.R. 4247, 111th Cong. § 4(16) (2009).
[311] *Id.* § 8(a)–(b).

However, even the small amount of research conducted by the GAO had a wide impact. Disability organizations became more involved in the fight against restraint and seclusion, and states became more aware of their current regulations and began implementing new ones. If the Keeping All Students Safe Act requires the Department of Education and all of the states to collect and report data, it will provide more information on the use of restraint and seclusion, and we may be able to prevent not only the use of, but the harm caused by, these techniques.

Finally, under the new bill, protection and advocacy organizations are given more power to monitor, investigate, and enforce the protections provided for students.[312] Although many schools fear an increase in litigation, the bill provides additional regulations to protect students, making it easier to make adequate claims against schools under IDEA, section 504 of the ADA, and the Fourteenth Amendment. The majority of these claims fail because courts continually find either (1) that the school staff member was acting within their educational discretion and using techniques approved by the school district or (2) that the staff member is protected because without a law banning such techniques, the staff member could only assume his/her use is acceptable. Now, plaintiffs can use the bill as evidence that the use of physical restraint and seclusion has some limits, and if a teacher goes beyond them, it is a violation of the student's rights.

In *Rasmus v. Arizona*, the plaintiff used a publication by the Arizona Department of Special Education to show that the use of seclusion was not a favored technique and was a violation of the student's rights.[313] The court found that the document contained guidelines prepared by the state with the specific prohibition of locked seclusion. Therefore, by placing the student in a locked seclusion room, the school's actions were an unreasonable response to the student's behavior.[314]

If all states are required to use the same minimum regulations and guidelines outlined in the bill, it will make it easier for judges to determine whether the school employee was aware of these guidelines, and if so, whether the employee reasonably followed the guidelines.

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[312] *Id.* § 9. The legislation uses vague and overly broad language prohibiting certain practices in schools, creating a window of opportunity for trial lawyers to capitalize on schools' efforts to keep students and teachers safe. Kline, *supra* note 37.

[313] Rasmus v. Arizona, 939 F. Supp. 709, 715–16 (D. Ariz. 1996).

[314] *Id.* at 717.

C. The Keeping All Students Safe Act is Still Not Enough

Even though Congress and the Obama administration have made huge strides in trying to get this bill passed, in the end it is still not enough to keep students with disabilities safe in schools. One of the major concerns with the bill is that it will override current state law. In reality, the Keeping All Students Safe Act is nothing more than a mirror image of the laws that are already on the books.

For example, the new bill requires all states to keep data for all incidents of restraint and seclusion, as California and Connecticut already do. Although this is an improvement for the states in which such a requirement does not exist, experience shows that it does not reduce the number of incidents. From 2007 to 2009 the number of restraints and seclusions in California rose from around 14,000 to over 21,000 incidents.[315] Despite this increase, according to the Department of Education's summary on state seclusion and restraint laws and developments, California is not currently making any effort to analyze this data and create more effective regulations.[316]

Similarly, current Texas law states that seclusion is never allowed, and restraint is only allowed when there is an immediate or imminent danger of harm to a person or property.[317] Yet, there are over 18,000 incidents of restraint each year. The new bill not only allows restraint, but it also allows seclusion to be used for the same situations. If Texas has a relatively stringent law, allowing only restraint in the most severe situations, what will happen in a state that still allows both restraint and seclusion?

In Connecticut, all teachers are required to undergo training in alternative behavior interventions and de-escalation techniques. In December 2010, Connecticut released a report indicating that there were over 18,000 incidents of restraint—and Connecticut has less than one-sixth the number of children as Texas.[318]

There are several other major issues with the current bill, as it sits in the Senate. First, the bill creates exceptions to the training requirement. Second, restraint and seclusion techniques could be included in a student's IEP. And finally, the bill fails to remove dangerous teachers from the classroom.

Under section 5 of the bill, teachers are required to receive training in de-escalation and the use of restraint and seclusion. However, a

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[315] *See supra* notes 169–71 and accompanying text.

[316] *See* Summary of Seclusion and Restraint Statutes, *supra* note 137, at 23–24.

[317] *See* 19 Tex. Admin. Code § 89.1053 (2007).

[318] Children in the States Factsheet, *supra* note 149.

teacher can still perform either of these techniques without training. Under section 5(a)(2)(D)(2), if there are no trained and certified personnel present, and an emergency arises that requires immediate use of restraint or seclusion, an untrained staff member may perform these procedures.[319] As a result, the training requirement in the bill is nothing more than an empty clause. In order to be an effective clause, the bill should require all school staff to undergo training, not just those who are likely to have to perform such techniques.

If schools are allowed to place these interventions in a student's IEP, a child may be left with no constitutional protections. Once a parent consents to the use of restraint or seclusion in an IEP, regardless of whether they change their mind down the road, courts have held that teachers are required to perform those interventions. Otherwise they are placing themselves in danger of violating IDEA by not following the IEP. If the Senate allows this addition to pass, the bill is once again nothing but empty words.

The bill does not allow the use of restraint and seclusion solely for disciplinary reasons or out of convenience. However, when the school's action is noted in a student's IEP as an intervention, it is nearly impossible to draw a line between discipline, convenience, and possible harm. Whatever the reason for a school's restraint or seclusion action, teachers are protected from any sort of repercussions.

Teachers currently remain in the classroom even after it is discovered that they have abused their power or caused harm to a child while using restraint or seclusion. Even if the bill is passed, teachers will continue to have that protection. The GAO found that in five of the ten evaluated cases the teacher or staff member responsible for causing harm, remained in the classroom. Yet, the new bill does nothing to remove these teachers from a school setting.[320]

Finally, the biggest disappointment of the Keeping All Students Safe Act is that it continues to allow schools to use the same techniques that have caused serious bodily injury, psychological harm, and even death to students across the country. The bill effectively prohibits the use of any sort of restraint that may cause suffocation, but it is silent about the techniques that have caused students to break an arm or leg or bust open their chin. Furthermore, techniques like these have been proven to cause students psychological harm for the rest of their lives, including suicidal ideation.

Although the bill will add additional regulations, provide more protections than currently exist, and ban prone restraint in all schools, it

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[319] Keeping All Students Safe Act, H.R. 4247, 111th Cong. § 5(a)(2)(D)(ii) (2009).
[320] Ryan et al., *supra* note 123.

does not guarantee that students will be free from harm.

VI. WHAT NEEDS TO CHANGE IN ORDER TO PROTECT STUDENTS FROM THE USE OF RESTRAINT AND SECLUSION?

There are only two requirements that should be mandated by the Department of Education with regard to the use of restraint and seclusion. First, the use of restraint and seclusion should be eliminated entirely. Second, schools should be required to implement positive support plans and training in the use of de-escalation techniques.

A. Completely Eliminating Restraint and Seclusion

In the Green Bay Area Public School District, the executive director of educational services has taken a new approach, and has attempted to eliminate the use of restraint and seclusion even though it is not banned by the state.[321] According to the executive director, restraint and seclusion are antiquated ways of dealing with students who are noncompliant.[322]

Teachers insist on the continued use of these intervention techniques even though there is no confirmed research supporting their effectiveness. The director of the Green Bay Area Public School District did not see any benefit to the use of seclusion, so she eliminated it.[323] So far the research shows that restraint and seclusion are harmful techniques that cause an *increase* in the unwanted behavior instead of a decrease. Many of these students have disabilities that impair impulse control or understanding which "lead[s] them to be prone to difficult behavior."[324] Using intervention will only perpetuate this behavior.[325]

Furthermore, it is clear from state data reports, the GAO report, and the numerous other studies that the use of restraint and seclusion will not decrease unless the regulations are even more stringent than the current laws. Texas has the most stringent law regulating restraint and has still been unable to reduce the number of restraints below 18,000. Eliminating these techniques will not only protect children from physical

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[321] SpecialEdConnection.com, *supra* note 31.
[322] *Id.*
[323] *Id.*
[324] Susie Bucaro, *A Time Out or A Knock Out: Has the Use of Restraint Against Students with Disabilities Become a Form of Corporate Punishment*, 15 Pub. Int. L. Rep. 62, 65 (2009).
[325] *Id.* at 66.

harm and death, it will also protect staff members who try to use restraint to keep from being physically injured. The more restraint is used, the more likely the person performing the restraint will also be injured.[326]

Eliminating restraint and seclusion will also force teachers and school districts to provide necessary and appropriate educational services for students with disabilities. A new teacher may be unaware of the behaviors that come along with autism, ADHD, or emotional disorders, and may not be prepared to handle these situations. Allowing educators to use dangerous and harmful restraint and seclusion techniques without proper training will only make their jobs more difficult. By using these types of techniques, neither the teacher nor the student learns how to communicate or deal with similar situation.[327] These students need professional support and counseling to address their issues; physically restraining them or locking them in a closet will not improve their behavior and will only cause harm to the student and the staff member. If Congress and the Obama administration are truly committed to eliminating physical harm and death of students with disabilities at the hands of educators, then restraint and seclusion must be eliminated in the classroom.

Unlike aversive techniques, the positive behavioral interventions and supports (PBIS) system allows a child to change their behavior in the long term, learning to control behavior and decrease violent or uncontrollable outbursts. If teachers and school districts implement this type of intervention, they will be able to successfully eliminate the use of restraint and seclusion. As the Green Bay Area Public School District demonstrates, they will no longer have a need for such techniques.

B. Introduction of New Interventions

Many educators are understandably fearful of the complete elimination of restraint and seclusion because they believe this is the only way to deal with violent children. Research shows that the best strategy is to use positive support plans or behavior support interventions. Aversive techniques such as restraint and seclusion reduce the immediate problem, but they fail as long-term solutions. These types of techniques fail to teach students how to behave properly and how to deal with their own emotions.[328] Instead, teachers and schools should encourage students to learn positive or desirable self-directed behaviors

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[326] Specialedconnection.com, *supra* note 31.
[327] Restraint and Seclusion in California Schools, *supra* note 169, at 27–28 (2007).
[328] *Id.* at 27–28.

that students can use and maintain in the long term.

Implementing positive behavior support plans provides a better chance for the student's behavior to improve over time, because the student learns to deal with his/her own behavior issues. PBIS "is based upon understanding why the student behaves in a certain way and what he is trying to communicate with the maladaptive behavior, and then replacing the inappropriate behavior with a suitable functionally equivalent replacement behavior."[329] In order for PBIS to work, schools must be willing to create and implement plans designed for each individual student based on their behaviors.

VII. CONCLUSION

The use of restraint and seclusion has done nothing more than cause physical and emotional harm to children with disabilities, without improving the behavior of these students. Restraint and seclusion do not achieve their intended goals, and only make the situation worse in the long term. By eliminating restraint and seclusion and implementing positive behavior intervention support plans, students will learn how to control their behavior, and over time, the need for restraint and seclusion will disappear. If the Obama administration and Congress truly intend to protect students with disabilities and decrease the number of deaths and incidents that result in bodily injury, the only way to ensure such a result is to eliminate the use of restraint and seclusion altogether.

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[329] *Id.*

Bucking *Grutter*: Why Critical Mass Should Be Thrown Off the Affirmative-Action Horse

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I. INTRODUCTION

Legal discourse is awash with metaphors like "slippery slope,"

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"color blind," and "ripeness."[1] These metaphors are often purely illustrative, such as "fruit of the poisonous tree" to describe derivative evidence tainted by the illegality of its source,[2] but they may also have substantive consequences. In 2003, the Supreme Court decided a pair of affirmative-action cases arising out of admissions plans at the University of Michigan,[3] and the notion of "critical mass" played an enormous role. Indeed, it was the key difference between the successful law school admissions program and the doomed undergraduate one.[4]

The trouble is that "critical mass" means something different to everyone. Judges and commentators who use the term rarely explain what they think it means or entails. Such an elusive concept makes for a brilliant rhetorical device but a poor basis for constitutional law: "[I]ts elasticity and indeterminacy . . . allow people to invoke the term to assert varying normative positions under various circumstances without actually making an extended argument to defend those positions."[5] An interest so compelling that courts will allow racial classifications to be employed in its pursuit "must constitute more than meaningless jargon."[6]

In this Note, I will describe the origins of the term "critical mass" and its use in legal discourse; lay the doctrinal groundwork for a discussion of the *Grutter* decision; examine the *Grutter* Court's reliance on critical mass, hopefully rehabilitating the theory against the objections of the dissenters; and analyze some of the social-science evidence that was offered in support of the critical mass theory of affirmative action. Ultimately, I hope to show that although critical mass is supportable in principle, it was not supported in *Grutter*. The concept is theoretically sound in the affirmative-action context, but the Court's slapdash analysis of the empirical evidence shows why critical mass is too illusory to be a useful doctrinal tool.

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[1] *See* Adeno Addis, *The Concept of Critical Mass in Legal Discourse*, 29 CARDOZO L. REV. 97, 129 (2007).

[2] *See* Wong Sun v. United States, 371 U.S. 471, 487–88 (1963).

[3] Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003).

[4] The law school's plan sought to enroll a "critical mass" of minority students, *Grutter*, 539 U.S. at 316, while the undergraduate plan awarded a fixed bonus of twenty points to all applicants who were members of an "underrepresented racial or ethnic minority group," *Gratz*, 539 U.S. at 255.

[5] Adeno Addis, *Role Models and the Politics of Recognition*, 144 U. PA. L. REV. 1377, 1380 (1996), *cited in* Addis, *supra* note 1, at 99 n.16. The concept of "diversity" itself suffers from the same flaw. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 377 F.3d 949, 962 (9th Cir. 2004) ("[T]he diversity rationale ha[s] often been criticized as 'amorphous,' 'abstract,' 'malleable,' and 'ill-defined.'"); Grutter v. Bollinger, 539 U.S. 306, 354 n.3 (2003) (Thomas, J., dissenting) ("'[D]iversity' . . . is more a fashionable catchphrase than it is a useful term, especially when something as serious as racial discrimination is at issue.").

[6] Maria Funk Miles, *Confusing Means with Ends*, 2005 BYU EDUC. & L.J. 245, 256 (2005).

II. THE THEORY OF CRITICAL MASS

A. Cases Invoking Critical Mass

The Supreme Court had made a number of cursory references to critical mass before *Grutter*. In a First Amendment case, the Court upheld a Los Angeles ordinance prohibiting the concentration of two or more "adult operations" in the same establishment.[7] The city enacted the ordinance after a 1977 study concluded that "concentrations of adult businesses are associated with higher rates of prostitution, robbery, assaults, and thefts in surrounding communities."[8] In his concurring opinion, Justice Kennedy observed that "[t]wo or more adult businesses in close proximity seem to attract a critical mass of unsavory characters . . . ."[9] He also referred to the "critical mass" of customers (as potential victims of crime) needed to attract ne'er-do-wells.[10]

In an Establishment Clause challenge, the Supreme Court held that the Ku Klux Klan could not be prevented from erecting a cross in a public forum near the Ohio state capitol.[11] The state argued that issuing a permit might "produce the perception that the cross [bore] the State's approval."[12] Justice Scalia's majority opinion rejected this argument, saying that such a "perception" standard would force states to "guess whether some undetermined critical mass of the community might . . . perceive the [state] to be advocating a religious viewpoint."[13] Scalia apparently thought that the meaning of "critical mass" was so obvious that it required no explanation.

The Court had even invoked the critical mass concept in a pre-*Grutter* university-admissions case.[14] In evaluating Virginia Military Institute's policy of excluding women, the majority adopted the trial judge's conclusion that active recruitment of women could "'achieve at least 10% female enrollment'—'a sufficient critical mass to provide the female cadets with a positive educational experience.'"[15] Again, "critical mass" was left undefined.

At the Court of Appeals level, the notion of critical mass has been invoked in cases involving employment discrimination,[16] zoning,[17] video

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[7] City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002).
[8] *Id.* at 430.
[9] *Id.* at 452 (Kennedy, J., concurring).
[10] *Id.* ("Depending on the economics of vice, 100 potential customers/victims might attract a coterie of thieves, prostitutes, and other ne'er-do-wells; yet 49 might attract none at all.").
[11] Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995).
[12] *Id.* at 763.
[13] *Id.* at 767.
[14] United States v. Virginia, 518 U.S. 515 (1996).
[15] *Id.* at 523 (quoting United States v. Virginia, 766 F. Supp. 1407, 1437–38 (W.D. Virginia 1991)).
[16] *See* Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169 (11th Cir. 2005); Phillips v. Bowen, 278 F.3d 103 (2d Cir. 2002); Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975).

games,[18] antitrust,[19] campaign finance,[20] and securities regulation.[21] However, none of these cases makes a sincere effort to explain their use of "critical mass."

B. What Critical Mass Might Mean

The notion of critical mass comes from the theory of nuclear reactions; it is "the precise minimum level of fissionable . . . uranium that is required to start and sustain a chain reaction of nuclear fission."[22] A reaction "goes critical" when there is enough uranium in the sample that a "typical neutron emitted near the center of the sphere will likely collide with a uranium nucleus before reaching the outer surface."[23] In its original, scientific sense, critical mass has three features:

> [T]he existence of a precise minimum level of the required material for a change to take place; a change that is sudden and transformative; and that the change is not simply a function of a minimum level of the resource but also a function of how elements of that resource interact with one another.[24]

Since its first use in 1919,[25] the term "critical mass" has been extended to describe much more than atomic bombs, including many biological and social phenomena. As I discussed, the concept is so seductively intuitive that courts and commentators have used the term without considering what it can sensibly mean in a social-science context. *Grutter* itself proves that there is still "no agreement as to what the concept precisely means."[26]

One possibility, indeed the closest to the scientific sense, is that critical mass in the social sciences still means an exact number.[27] For example, a narcissist may agree to attend a party only if forty other people show up. Less specifically, a pedestrian may cross against a light only if enough other people cross that he feels sure he will not be hit by a car. In these cases, it is not only the number of other participants that is

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[17] *See* River of Life Kingdom Ministries v. Vill. of Hazel Crest, 585 F.3d 364 (7th Cir. 2009).
[18] *See* E.S.S. Entm't 2000 v. Rock Star Videos, Inc., 547 F.3d 1095 (9th Cir. 2008).
[19] *See* Novell, Inc. v. Microsoft Corp., 505 F.3d 302 (4th Cir. 2007); Olson v. Nat'l Broad. Co., 855 F.2d 1446 (9th Cir. 1988).
[20] *See* Buckley v. Valeo, 519 F.2d 821 (D.C. Cir. 1975).
[21] *See* Braintree Labs., Inc. v. Citigroup Global Mkts., Inc., 2010 WL 3958862 (1st Cir. 2010).
[22] Addis, *supra* note 1, at 98.
[23] *Id.* at 103 (quoting Alan Lightman, *Megaton Man*, N.Y. REV. BOOKS, May 23, 2002, at 35).
[24] *Id.* at 98–99.
[25] *Id.* at 104 (citing Guenther Eichhorn & Michael J. Kurtz, *A Reader Answers: 'Critical Mass' Origin*, PHYSICS TODAY, May 2004, at 18).
[26] Addis, *supra* note 1, at 111.
[27] *See id.* at 124.

important, but "the immunity that those numbers provide . . . . One crosses a busy intersection against a red light not simply because a certain number of people have crossed, but because of perceived safety that come[s] with those numbers."[28] This idea makes sense in the affirmative action context: in a university class with a critical mass of minorities, minority students may be more inclined to speak not because of their numbers, but because of what those numbers "impl[y] about immunity from put-downs, ridicule and dismissive attitudes . . . ."[29]

The "safety in numbers" conception of critical mass must be tied to a proportion or range rather than an absolute number.[30] It is nonsensical to strictly model human behavior on neutrons,[31] and in a social setting, the nature of the participants matters as much as their numbers—critical mass "describes a highly contextual process."[32] Individual psychology matters, but that is not to say that "there is no threshold or that the threshold is unknowable or unpredictable."[33] It is certainly possible to measure when the average pedestrian is willing to jaywalk. Similarly, empirical studies should be able to determine the social and educational effects of minority representation in universities. The point of criticality will be determined not only by the size of a minority group, but also by the nature of its members, the nature of the majority-group members, and the environment of the institution.[34] Context matters.

This is the conception of critical mass underlying the majority opinion in *Grutter*; the recent Fifth Circuit case *Fisher v. University of Texas* makes the point explicitly. I will return to *Fisher* in Part IV-C.

III. THE DOCTRINAL FOUNDATION OF *GRUTTER*

A. Prior Cases Invoking Diversity

The appeal of diversity in education came long before *Grutter*. In 1950, the Supreme Court held that Texas's establishment of an inferior all-black law school did not satisfy the "separate but equal" requirement of *Plessy v. Ferguson*, observing that "[f]ew students and no one who has practiced law would choose to study in an academic vacuum, removed from the *interplay of ideas and the exchange of views* with which the law

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[28] *Id.* at 124–25.
[29] *See id.* at 125.
[30] *Id.*
[31] *See* Comfort *ex rel.* Neumyer v. Lynn Sch. Comm., 263 F. Supp. 2d 209, 263 (D. Mass. 2003) ("This is not a case of scientific precision . . . and scientific precision should not be required.").
[32] Addis, *supra* note 1, at 133.
[33] *Id.*
[34] *Id.* at 134.

is concerned."[35] Similarly, in *McLaurin v. Oklahoma*, after the state was forced to admit a black applicant to a graduate program, it required him to sit apart from other students and eat at a designated table in the cafeteria at a different time.[36] The Court declared this segregation policy unconstitutional, noting that it "impair[ed] and inhibit[ed] [McLaurin's] ability to study, *to engage in discussions and exchange views with other students*, and, in general, to learn his profession."[37]

B. *Bakke* and its Aftermath

The seeds of the diversity rationale employed in *Grutter* were sown mainly in the 1978 case *Regents of the University of California v. Bakke*.[38] Allan Bakke, a white male, was rejected by the University of California at Davis School of Medicine in both 1973 and 1974.[39] At the time, the medical school set aside 16 seats (out of a class of 100) for "disadvantaged . . . members of minority groups."[40] Applicants who indicated that they were disadvantaged minorities were considered separately from other applicants by a special admissions committee.[41]

Bakke sued the university, alleging that the set-aside program "operated to exclude him from the school on the basis of his race" in violation of the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.[42] A chaotic set of opinions emerged. Justices Brennan, White, Marshall, and Blackmun concluded that the university's use of race was permissible "to remedy disadvantages cast on minorities by past racial prejudice."[43] Justices Stevens, Stewart, and Rehnquist, along with Chief Justice Burger, viewed the issue far more narrowly[44] and avoided the constitutional question altogether.[45] They held that the program's use of race violated Bakke's rights under Title VI, and that the university should be forced to admit him.[46]

Justice Powell's opinion, which was joined by no other Justice,

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[35] Sweatt v. Painter, 339 U.S. 629, 634 (1950) (emphasis added).
[36] 339 U.S. 637, 640 (1950).
[37] *Id.* at 641 (emphasis added).
[38] 438 U.S. 265 (1978).
[39] *Id.* at 266.
[40] *Id.* at 274 (internal quotation marks omitted).
[41] *Id.* at 275 ("[T]he general admissions committee . . . did not rate or compare the special candidates against the general applicants.").
[42] *Id.* at 277–78. Bakke further contended that the program violated the state constitution of California, but none of the opinions addressed that claim. *See id.* at 278.
[43] *Bakke*, 438 U.S. at 325 (opinion of Brennan, J.).
[44] *Id.* at 411 (opinion of Stevens, J.) ("It is therefore perfectly clear that the question whether race can ever be used as a factor in an admissions decision is not an issue in this case, and that discussion of that issue is inappropriate.").
[45] *Id.* at 411–12.
[46] *Id.* at 266–67.

ended up being the decisive one. Like Justice Stevens, he concluded that the university's special-admissions program was an unlawful quota.[47] But he also held that the Equal Protection Clause was not a total bar to the consideration of race in university admissions,[48] a narrower version of the position taken by Justice Brennan.

Justice Powell decided that, of the four justifications asserted by the university, the only one that could withstand strict scrutiny was its interest in realizing the educational benefits brought about by a diverse student body.[49] He leaned heavily on "[a]cademic freedom, . . . a special concern of the First Amendment,"[50] reasoning that universities should be allowed to admit whoever will contribute the most to a "robust exchange of ideas."[51] Applicants from diverse backgrounds (of any sort) may bring "experiences, outlooks, and ideas that enrich the training of its student body."[52]

Ultimately, Justice Powell concluded that the UC-Davis program amounted to an impermissible racial quota, failing the narrow tailoring prong of the strict scrutiny test.[53] However, he offered guidance to universities wishing to pursue racial diversity through their admissions policies. He spoke approvingly of the Harvard admissions plan, which considered all applicants together but treated race as a "plus" factor.[54] Individual consideration was the crucial distinction. A constitutional admissions program must not reserve spots for members of one race, and it must consider nonracial attributes likely to promote educational pluralism, such as "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, [or] ability to communicate with the poor."[55]

The ungainly 4–1–4 split in *Bakke* led to a good deal of consternation. Indeed, the disagreement over whether Justice Powell's opinion was binding precedent at all lasted through the Sixth Circuit's consideration of *Grutter*.[56] Antonin Scalia, a law professor at the time of *Bakke*, grudgingly accepted Justice Powell's opinion as "the law of the land."[57] In a 1986 concurring opinion, Justice O'Connor (citing *Bakke*)

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[47] *Id.*

[48] *Bakke*, 438 U.S. at 314.

[49] *Id.* at 311–12. Justice Powell rejected the university's other defenses on Equal Protection grounds: (1) reducing the deficit of minorities in the medical profession; (2) countering the effects of societal discrimination; and (3) increasing the access of underserved communities to medical care. *See id.* at 306.

[50] *Id.* at 313.

[51] *Id.*

[52] *Id.* at 314.

[53] *Bakke*, 438 U.S. at 316–18 ("[T]he assignment of a fixed number of places to a minority group is not a necessary means toward that end.").

[54] *Id.* at 317.

[55] *Id.*

[56] *See* Ann Mallatt Killenbeck, Bakke, *With Teeth?: The Implications of* Grutter v. Bollinger *in an Outcomes-Based World*, 36 J.C. & U.L. 1, 17–19 (2009).

[57] Antonin Scalia, *The Disease as Cure*, 1979 WASH. U. L. Q. 147, 148 (1979). I call Professor

indicated that "although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest."[58]

In the years between *Bakke* and *Grutter*, the Fourth, Seventh, Eighth, and Ninth Circuits all appeared to accept *Bakke* as binding.[59] But not everyone agreed. The Fifth Circuit stated strongly in *Hopwood v. Texas* that "Justice Powell's view in *Bakke* is not binding precedent" on the issue of whether diversity is a compelling interest.[60]

The Second Circuit, although it acknowledged that only the Fifth Circuit had ruled that diversity could never justify race-based preferences, pointed out a "lack of clear Supreme Court precedent" on the issue.[61] The Eleventh Circuit similarly reasoned that Justice Powell's opinion had only "persuasive value" and referred to the viability of diversity as a compelling interest an "open question."[62]

The reaction went critical, so to speak, in the University of Michigan cases. The trial judge in *Gratz* held that Justice Powell's opinion in *Bakke* established that diversity was a compelling interest for purposes of Equal Protection analysis.[63] In *Grutter*, the trial judge came to the opposite conclusion.[64] It gets worse. On appeal,[65] five judges of the Sixth Circuit sitting en banc treated Justice Powell's discussion of the diversity rationale as controlling,[66] while the four dissenting judges characterized it as self-indulgent dicta: "Any speculation regarding the circumstances under which race could be used was little more than an advisory opinion, as those circumstances were not before the court . . . ."[67]

Scalia's acceptance grudging because he also said that Justice Powell's opinion read more like schlock peddled by "committees of the American Bar Association on some insignificant legislative proposal" than legal analysis worthy of a Supreme Court opinion. *Id.*

[58] Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311–15 (1978) (opinion of Powell, J.)).

[59] *See* Talbert v. City of Richmond, 648 F.2d 925, 928–29 (4th Cir. 1981); Harp Adver. Ill., Inc. v. Vill. of Chicago Ridge, 9 F.3d 1290, 1292 (7th Cir. 1993); Nor-West Cable Commc'ns P'ship v. City of St. Paul, 924 F.2d 741, 748–49 (8th Cir. 1991); Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188, 1201 (9th Cir. 2000) ("[A]t our level of the judicial system Justice Powell's opinion remains the law.").

[60] 78 F.3d 932, 944–45 (5th Cir. 1996). *Hopwood* famously went on to hold that a university's interest in diversity can never justify the use of race in admissions. *Id.* at 948 ("[T]he use of race to achieve a diverse student body . . . simply cannot be a state interest compelling enough to meet the steep standard of strict scrutiny.").

[61] Brewer v. W. Irondequoit Cent. Sch. Dist., 212 F.3d 738, 748 (2d Cir. 2000).

[62] Johnson v. Univ. of Ga., 263 F.3d 1234, 1245 (11th Cir. 2001).

[63] Gratz v. Bollinger, 122 F. Supp. 2d 811, 820 (E.D. Mich. 2000).

[64] Grutter v. Bollinger, 137 F. Supp. 2d 821, 847–48 (E.D. Mich. 2000) ("Justice Powell's discussion of the diversity rationale is not among the governing standards to be gleaned from *Bakke*.").

[65] Although both *Gratz* and *Grutter* were appealed, the Sixth Circuit decided only *Grutter*.

[66] *Grutter*, 288 F.3d at 747.

[67] *Grutter*, 288 F.3d at 787 (Boggs, C.J., dissenting).

C. Other Doctrinal Difficulties

There was an added complication to the Supreme Court's consideration of *Gratz* and *Grutter*. Justice Powell's opinion in *Bakke* applied strict scrutiny to UC-Davis's admissions program, even though Allan Bakke was white and the program's beneficiaries were racial minorities: "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."[68] Whatever disagreements there were about the precedential force of his opinion, the Supreme Court had certainly adopted that portion of it by the time it considered *Grutter*.[69] It decided, after some ado, that it was simply impossible to distinguish between "benign and harmful uses of racial classifications."[70] The clearest and strongest statement of this principle came in *Adarand Constructors, Inc. v. Peña*: "[A]ll racial classifications . . . must be analyzed by a reviewing court under strict scrutiny."[71]

In another twist, the disparate-impact case *Washington v. Davis* held that a plaintiff must prove discriminatory *intent* to prevail on an Equal Protection claim; the "racially disproportionate impact" of a government action is not enough.[72] The intersection of *Davis* and *Adarand* had a grotesque effect: "[F]acially neutral government action that preserved racial stratification was subject to only a rational basis test, but race-conscious government action that attempted to ameliorate racial stratification was subject to strict scrutiny."[73]

The doctrinal landscape when *Grutter* came to the Supreme Court seemed to be roughly this: (1) although diversity in educational settings had been recognized as a worthwhile goal,[74] there was profound disagreement on whether it constituted a compelling government interest;[75] (2) other non-remedial uses of racial classifications would be

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[68] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) (opinion of Powell, J.).

[69] *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273 (1986) ("[T]he level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination."); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989) ("[T]he standard of review . . . is not dependent on the race of those burdened or benefited by a particular classification.").

[70] Susan M. Maxwell, *Racial Classifications Under Strict Scrutiny: Policy Considerations and the Remedial-Plus Approach*, 77 TEX. L. REV. 259, 266 (1998) (citing *Croson*, 488 U.S. at 493 ("[T]here is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.")).

[71] 515 U.S. 200, 227 (1995). I call *Adarand*'s statement the strongest because it explicitly overruled *Metro Broad., Inc. v. F.C.C.*, 497 U.S. 547 (1990), which had authorized a two-tiered approach that depended on what group was disadvantaged by the government action.

[72] 426 U.S. 229, 239 (1976).

[73] Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1567 (2004).

[74] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317–18 (opinion of Powell, J.); *Wygant*, 476 U.S. at 306 (Marshall, J., dissenting).

[75] *See, e.g.*, Hopwood v. Tex., 78 F.3d 932, 948 (5th Cir. 1996).

met with extreme skepticism; (3) although the remedial use of race to counteract specific instances of discrimination was appropriate, the goal of remedying general "societal discrimination" was too amorphous to serve as the basis for race-conscious government action;[76] and (4) all admissions plans that considered race as a factor would be subjected to strict scrutiny.[77]

IV. *GRUTTER V. BOLLINGER*

Barbara Grutter applied to the University of Michigan Law School in 1996 and was rejected.[78] She sued the university, claiming that its admissions policy violated the Equal Protection Clause because it used race as a "predominant factor, giving applicants who belong[ed] to certain minority groups a significantly greater chance of admission than students with similar credentials from disfavored racial groups."[79]

A. The Law School's Admissions Plan

In 1992, the University of Michigan Law School enacted an admissions policy designed to "achieve student body diversity" by focusing on "academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential to contribute to the learning of those around them."[80] The policy heavily weighed "hard factors," such as an applicant's Law School Admission Test (LSAT) score and undergraduate grade point average (GPA), but "even the highest possible score [did] not guarantee admission."[81] Under the policy, the admissions committee considered a number of "soft" variables as well: "[T]he enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, and the areas and difficulty of undergraduate course selection are all brought to bear in assessing an applicant's likely contributions to the intellectual and social life of the institution."[82]

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[76] *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499 (1989) (stating that a government interest in undoing societal discrimination would demand "sheer speculation"); *Bakke*, 438 U.S. at 310 (opinion of Powell, J.) (dismissing the societal-discrimination rationale because it would "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.").

[77] *See Bakke*, 438 U.S. at 291; Adarand Constructors, Inc. v. Peña 515 U.S. 200, 227 (1995).

[78] Grutter v. Bollinger, 539 U.S. 306, 316 (2003).

[79] *Id.* at 317 (internal quotation marks omitted).

[80] *Id.* at 314–15 (internal quotation marks omitted).

[81] *Id.* at 315.

[82] *Id.* (internal quotation marks omitted).

The law school's admissions policy gave "substantial weight" to the "many possible bases for diversity," but it also reaffirmed the law school's commitment to "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in [the] student body in meaningful numbers."[83] The law school sought to enroll a "critical mass" of underrepresented minority students.[84]

The evidence offered by the law school left little doubt that the admissions plan had been carefully massaged to comply with Justice Powell's opinion in *Bakke*.[85] Throughout the litigation, the law school asserted only diversity as a justification for its admissions plan,[86] even though the trial judge wanted to address the issue of racial bias in admissions criteria.[87] The law school also refused to name a minimum percentage at every stage, knowing that any minimum could be viewed as an unconstitutional quota.[88]

Dennis Shields, the director of admissions at the time of Barbara Grutter's application, testified at trial that the policy was meant "to ensure that a critical mass of underrepresented minority students would be reached so as to realize the educational benefits of a diverse student body."[89] But he stressed that the plan "did not seek to admit any particular number or percentage . . . ."[90] Shields's successor, Erica Munzel, similarly testified that "critical mass" did not mean any particular "number, percentage, or range of numbers or percentages," adding that the law school's goal was to admit underrepresented minority students in numbers sufficient to encourage them "to participate in the classroom and not feel isolated."[91]

Jeffrey Lehman, the dean of the law school at the time of the suit, reiterated that the admissions committee "did not quantify critical mass in terms of numbers or percentages."[92] He cited the isolation concern as well, arguing that a critical mass would help prevent minority students from feeling like "spokespersons for their race."[93] The professor who

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[83] *Grutter*, 539 U.S. at 316.

[84] *Id.*

[85] Recall that Justice Powell invalidated the consideration of race in admissions to achieve racial balance, or to correct whatever "societal discrimination" may have led to minorities' underrepresentation in the class in the first place. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307, 310 (1978).

[86] *Grutter*, 539 U.S. at 327–28.

[87] William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving "Elite" College Students*, 89 CALIF. L. REV. 1055, 1120 n.309 (2001).

[88] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 271 (1978).

[89] *Grutter*, 539 U.S. at 318.

[90] *Id.*

[91] *Id.*

[92] *Id.* at 318–19.

[93] *Id.* at 319.

had chaired the policy-drafting committee in 1992, Richard Lempert, echoed these claims about diversity.[94] Interestingly, despite the policy's overt reference to historical discrimination, Lempert specifically denied that the law school's purpose was "to remedy past discrimination."[95] He conceded that "other groups, such as Asians and Jews, have experienced discrimination," but explained that they were not included in the policy because they "were already being admitted to the Law School in significant numbers."[96]

B. Justice O'Connor's Majority Opinion in *Grutter*

The *Grutter* Court did not resolve the controversy over the degree to which Justice Powell's opinion was binding.[97] But *Grutter* did end the dispute, declaring that "student body diversity is a compelling state interest that can justify the use of race in university admissions."[98] In the majority opinion, Justice O'Connor reaffirmed *Adarand*'s holding that all racial classifications "'must be analyzed . . . under strict scrutiny,'"[99] meaning that "such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests."[100] But she also emphasized that "[n]ot every decision influenced by race is equally objectionable" and that strict scrutiny "must take relevant differences into account."[101] In other words, context matters.[102]

The Court also stressed that universities are entitled to some latitude in deciding how much emphasis to put on student-body diversity: "The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. . . . Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits."[103]

The holding of *Grutter* was that "the Law School ha[d] a compelling interest in attaining a diverse student body."[104] At this point, it is important to note the unfortunate conflation of the terms "diversity"

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[94] *Grutter*, 539 U.S. at 319.
[95] *Id.*
[96] *Id.*
[97] *See id.* at 325.
[98] *Id.*
[99] *Grutter*, 539 U.S. at 326 (quoting Adarand Constructors v. Peña, 515 U.S. 200, 227 (1995)) (citations omitted).
[100] *Id.*
[101] *Id.* at 327 (internal quotation marks omitted); *see also* Gomillion v. Lightfoot, 364 U.S. 339, 343–44 (1960) ("[G]eneralizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts.").
[102] *See id.*
[103] *Id.* at 328.
[104] *Grutter*, 539 U.S. at 328.

and "educational benefits of diversity" committed by both Justices Powell and O'Connor.[105] In my view, "diversity" standing alone means nothing more than the numerical representation of minority groups, which the Equal Protection Clause clearly prohibits.[106] On the other hand, the "educational benefits of diversity" are a constitutionally permissible goal:

> [Diversity] promotes cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races. These benefits are important and laudable, because classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.[107]

Bakke too described the benefits of diversity:

> The atmosphere of speculation, experiment and creation—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body. . . . [T]he nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.[108]

"Critical mass," employed as a justification for affirmative action, can make sense only if its aim is to achieve the *benefits* flowing from diversity.[109] Just as a critical mass of uranium leads to a "sudden and transformative" change in the nuclear reaction and in the way its elements interact with one another,[110] a critical mass of minority students may produce the educational benefits Justice O'Connor described. But talking about critical mass as a means is nonsensical if pure numerical diversity is a valid end.

Justice O'Connor seems to overlook this crucial distinction.

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[105] *See generally* Miles, *supra* note 6.

[106] *See Grutter*, 539 U.S. at 329–30 ("The Law School's interest is not simply 'to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.' That would amount to outright racial balancing, which is patently unconstitutional.") (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978); *Bakke*, 438 U.S. at 307 ("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.").

[107] *Grutter*, 539 U.S. at 330 (second alteration in original) (quoting Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001)) (internal quotation marks omitted).

[108] *Bakke*, 438 U.S. at 312 (first sentence quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957)) (second sentence quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)) (internal quotation marks omitted).

[109] Patrick M. Garry, *How Strictly Scrutinized?: Examining the Educational Benefits the Court Relied Upon in* Grutter, 35 PEPP. L. REV. 649, 652 (2008) ("It is the educational benefits deriving from diversity that were the real compelling interest behind the Law School's race-based admissions policy. Diversity, in effect, is only the means to the end."); *see also Grutter*, 539 U.S. at 354–55 (Thomas, J., dissenting) ("Attaining 'diversity,' whatever it means, is the mechanism by which the Law School obtains educational benefits, not an end of itself.").

[110] Addis, *supra* note 1, at 98–99.

Nevertheless, even though she used these terms interchangeably, she must have meant that the interest lies in realizing the educational benefits of having a diverse student body. Indeed, she later referred to the law school's "compelling interest in securing the educational benefits of a diverse student body."[111] The difference matters because, if the university's compelling interest is in the educational *benefits* of diversity, an admissions plan must *actually produce* those benefits to be constitutionally valid.[112]

Having held that the compelling interest requirement was met, the Court then turned to the second prong of the strict scrutiny test: narrow tailoring. In admissions, "a university may consider race or ethnicity only as a '"plus" in a particular applicant's file,' without 'insulat[ing] the individual from comparison with all other candidates for the available seats.'"[113] The majority determined that "[t]he Law School's goal of attaining a critical mass of underrepresented minority students [did] not transform its program into a quota."[114] *Grutter* adopted Justice Powell's view that "individualized consideration" was the linchpin of narrow tailoring:

> [A] university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. *The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.*[115]

C. The Dissenting Justices' Objections

The dissenting Justices in *Grutter* leveled two major criticisms at the majority opinion. First, they argued that granting any "deference" to the university was antithetical to strict scrutiny. Second, they were skeptical of the critical mass rationale, believing it to be a cover-up for otherwise-unconstitutional racial balancing.

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[111] *Grutter*, 539 U.S. at 333. *See also id.* at 330 ("[T]he Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce."). *But see id.* at 329 (characterizing the Court's holding as "conclu[ding] that the Law School has a compelling interest in a diverse student body").

[112] *See* Garry, *supra* note 109, at 652 ("If diversity produces no educational benefits, then diversity cannot be a compelling interest of an institution of higher education.").

[113] *Grutter*, 539 U.S. at 334 (quoting *Bakke*, 438 U.S. at 317).

[114] *Id.* at 335–36.

[115] *Id.* at 337 (emphasis added).

1. *The Majority Opinion's "Deference" to the University*

Chief Justice Rehnquist and Justices Thomas and Kennedy all contended that the majority's grant of "deference" to the university showed that it "[did] not apply strict scrutiny" to the law school's plan.[116] This is a sensible criticism, since a court applying strict scrutiny typically searches for reasons to *invalidate* the government action.[117] Indeed, strict scrutiny has been aphoristically described as "strict in theory, but fatal in fact."[118] "Deference," on the other hand, is the hallmark of the extremely permissive rational basis standard.

It is worth noting that, at least in federal courts, strict scrutiny results in invalidation in far from all cases.[119] The Supreme Court explicitly held before *Grutter* that strict scrutiny was not necessarily fatal.[120] More importantly, the dissenters mischaracterized Justice O'Connor's position: the deference "did not extend to whether diversity itself should be deemed a compelling interest."[121] It operated only to permit the law school to decide *whether* diversity was "essential to its educational mission,"[122] and *how* best to achieve the benefits of diversity. This fits with what follows in the opinion—an examination of the law school's conclusion that its plan would work: "The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici*."[123] The majority Justices in *Grutter* did review the record, and they held that the benefits of diversity were a compelling interest only when *they* were satisfied that the evidence supported that conclusion.[124]

Compare this approach to *Williamson v. Lee Optical*, in which the Court considered a Due Process challenge to an Oklahoma statute that

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[116] *Grutter*, 539 U.S. at 387–88 (Kennedy, J., dissenting) (also calling the Court's review "nothing short of perfunctory."). *See also id.* at 380 (Rehnquist, C.J., dissenting); *id.* at 362 (Thomas, J., dissenting) ("[T]he Law School's assessment of the benefits of racial discrimination and devotion to the admissions status quo are not entitled to any sort of deference.").

[117] *See* Paul Kahn, *The Court, the Community, and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1, 6 (1987) ("[E]qual protection law has essentially identified 'exacting' judicial scrutiny with judicial invalidation.").

[118] Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring). *See also* Kathleen M. Sullivan, *Gerald Gunther: The Man and the Scholar*, 55 STAN. L. REV. 643, 645 (2002) (calling the phrase "one of the most quoted lines in legal literature").

[119] Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 812–13 (2006) (discussing a statistical study that showed a survival rate of 30% in strict-scrutiny cases).

[120] *See* Adarand Constructors v. Peña, 515 U.S. 220, 237 (1995). Both *Grutter* and *Bakke* enlisted Korematsu v. United States, 323 U.S. 214 (1944) to support the proposition that government action analyzed under the strict scrutiny standard will sometimes be upheld. What is fascinating about *Korematsu* is that while the Court's majority held that the order excluding Japanese-Americans from certain areas *passed* strict scrutiny, *see Korematsu*, 323 U.S. at 219–20, the dissent declared that it *failed* even the rational basis test. *See id.* at 234–35 (Murphy, J., dissenting).

[121] Killenbeck, *supra* note 56, at 32.

[122] Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

[123] *Id.*

[124] *See id.* at 330.

made it unlawful to sell eyeglasses without a prescription.[125] The unanimous Court acknowledged that the law "may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance [its] advantages and disadvantages."[126] Justice Douglas's opinion essentially *invented* reasons the statute might have been valid[127] and concluded: "[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it *might be thought* that the particular legislative measure was a rational way to correct it."[128] That is deference.

Nevertheless, it is clear that the Court's scrutiny of the law school's plan in *Grutter* was not as strict as it might have been. To survive strict scrutiny, the government action must be necessary to achieve the compelling interest—the state "cannot rest upon a generalized assertion as to the [suspect] classification's relevance to its goals."[129] This scrutiny should be rigorous. In *Croson*, for example, the Supreme Court spent almost nine pages examining the relationship between the plan and its goals.[130] This is different from the Court's acceptance of critical mass as a means to achieve the benefits of diversity in *Grutter*, seeming to fudge the strict scrutiny standard by employing "a quite permissive reading of 'necessary.' . . . [T]he state of empirical knowledge about the educational benefits of diversity belies any claim of necessity."[131]

The reason this fudging is not as repugnant as the dissenting Justices claimed is that the necessity of a policy to further an interest is a comparatively poor question for judges to answer: "[T]hese decisions are a product of complex educational judgments in an area that lies . . . far outside the experience of courts."[132] Judges should certainly be the ones to decide if an interest is compelling. But if a policy's end is permissible, it seems appropriate to allow government actors to rely on their experience (and investigatory machinery) in deciding what means to employ. Such latitude is particularly fitting in the context of higher education, "given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment."[133]

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[125] Williamson v. Lee Optical, Inc., 348 U.S. 483, 485 (1955).
[126] *Id.* at 487.
[127] *See id.* (listing three reasons the legislature "might" have adopted the law).
[128] *Id.* at 487–88 (emphasis added).
[129] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989) (citing McLaughlin v. Florida, 379 U.S. 184, 191 (1964) ("The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose.")).
[130] *Croson*, 488 U.S. at 498–506.
[131] Paul Brest, *Some Comments on* Grutter v. Bollinger, 51 DRAKE L. REV. 683, 691 (2003).
[132] *See* Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 231 (5th Cir. 2011) (quoting Grutter v. Bollinger, 539 U.S. 306, 328 (2003)) (internal quotation marks omitted).
[133] *Grutter*, 539 U.S. at 329.

2. *The Majority's Reliance on Critical Mass*

The dissenters' more interesting complaint is with the notion of critical mass itself, which they are no more eager to define than the majority Justices. As in so many other cases, all the Justices in *Grutter* gave only facile consideration to the meaning of "critical mass" before either subscribing to it wholeheartedly or dismissing it as bunk.

Justice Scalia viewed the very invocation of critical mass as a one-way ticket to "quota land."[134] Despite the law school's insistence that it did not mean any specific percentage,[135] Justice Scalia leaned hard on the university's lawyer to identify "some minimum":[136]

> Justice Scalia: "Is 2 percent a critical mass, Ms. Mahoney?"
>
> Maureen Mahoney: "I don't think so, Your Honor."
>
> Scalia: "Okay. 4 percent?"
>
> Mahoney: "No, Your Honor, what—"
>
> Scalia: "You have to pick some number, don't you?"
>
> Mahoney: "—Well, actually what—"
>
> Scalia: "Like 8, is 8 percent?"
>
> . . . .
>
> Scalia: "As long as you say between 8 and 12 . . . it's okay, because it's not a fixed number? Is that . . . that's what you think the Constitution is?"[137]

In his dissent, Justice Scalia referred to the critical mass theory as "a sham to cover a scheme of racially proportionate admissions" that would challenge "even the most gullible mind."[138] Chief Justice Rehnquist similarly accused the law school of employing "a carefully managed program designed to ensure proportionate representation of applicants from selected minority groups."[139]

It is clear that Justice Scalia and Chief Justice Rehnquist were willing to accept only the purest analogy to the scientific concept of critical mass: the "*precise* minimum level of fissionable . . . uranium that is required to start and sustain a chain reaction of nuclear fission which

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[134] *See* Transcript of Oral Argument at 40, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), *available at* http://www.oyez.org/cases/2000-2009/2002/2002_02_241/argument.

[135] *See Grutter*, 539 U.S. at 318–19.

[136] *See Grutter* Oral Argument, *supra* note 134, at 37.

[137] *Id.* at 39–40.

[138] *Grutter*, 539 U.S. at 347 (Scalia, J., dissenting).

[139] *Id.* at 386 (Rehnquist, C.J., dissenting).

will in turn lead to explosion."[140] They wanted "to match every aspect of the phenomenon to be comprehended with aspects of those from which the analogy is borrowed."[141]

But this narrow-minded approach "cabin[s] the new phenomenon to the very limits of the old . . . in absurd ways."[142] For one thing, even in its scientific context, critical mass is not strictly about numbers: "The density, purity, and shape of the uranium, as well as its mass . . . will determine whether or not the lump 'goes critical.'"[143] More importantly,

> [I]t is certainly the case that whether there is a critical mass of students in a particular class for a particular purpose is partly going to depend on the character and identity of the students admitted, the nature of the entire class with which they will interact, and the processes and institutions through which the interaction takes place. Put simply, *critical mass in the social field describes a highly contextual process.*[144]

"Highly contextual" and "quota" cannot both describe the same admissions plan. In the six years following the adoption of the program, minority students constituted between 13.5% and 20.1% of the law school's graduating classes.[145] And though it is true that the law school could not control how many minority applicants accepted offers of admission,[146] the ultimate representation of minorities in each class nonetheless "differ[ed] substantially from their representation in the applicant pool and varie[d] considerably . . . from year to year."[147] A true quota would not have left the composition of the class up to the applicants. The University of California's program in *Bakke*, for example, set aside 16 *seats* in the class of 100 for disadvantaged minority students,[148] no matter how many applied. Presumably, if a student accepted by the special admissions committee declined admission, his seat would be offered to the next-highest-rated student in the special program.

Scientific concepts can illustrate social phenomena, but applying them sanely can be very difficult.[149] Properly conceived—as an

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[140] Addis, *supra* note 1, at 98 (emphasis added).

[141] *Id.* at 131–32.

[142] *Id.* at 132.

[143] *Id.* at 133 (quoting THOMAS C. SCHELLING, MICROMOTIVES AND MACROBEHAVIOR 95 (1978)).

[144] *Id.* (emphasis added).

[145] Grutter v. Bollinger, 539 U.S. 306, 336 (2003). *See also* Grutter v. Bollinger, 137 F. Supp. 2d 821, 842 n.27 (E.D. Mich. 2001) ("From the graduation years 1986 to 1999, underrepresented minorities constituted at least 9.8% (1999) and as much as 19.2% (1994) of the class, except in 1998 when the percentage dipped to 5.4%.").

[146] *See Grutter*, 539 U.S. at 385 (Rehnquist, C.J., dissenting).

[147] *Id.* at 336.

[148] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978) (referring to the program's "reservation of a specified number of seats in each class").

[149] It is alluring to rely on the "physics of society" to "extract order from the microscopic chaos" of human existence, but it is often an absurd trap. PHILIP BALL, CRITICAL MASS: HOW ONE THING LEADS TO ANOTHER 68, 71 (2004). For example, Herbert Spencer tried to force social survival

imperfect analogy—critical mass is most sensibly transplanted to the social field as a highly contextual process that takes into account all the attributes of actors and institutions:[150] "The nature of the entire entering class, the nature of the minority students admitted, the environment or the institutional setup in which interaction is to take place, etc. all affect whether there is a critical mass in a given context to . . . bring about the desired change."[151] For instance, "[a] solitary but extraordinarily strong-willed minority person may constitute critical mass at one institution, where critical mass might require 1,000 weaker-willed persons on another campus."[152]

> Such a flexible framework is antithetical to the "needlessly rigid and neglectful"[153] character of a quota: "If numbers change depending on the nature of the profile of the students admitted and the nature of the interactive process in the given institution, then there cannot be a fixed number. . . . [S]uch a flexible process cannot admit a notion as rigid as a quota."[154]

Chief Justice Rehnquist also observed that the law school's plan tended to admit many more black applicants than Hispanic or Native American applicants.[155] This, he suggested, showed that critical mass was just a vehicle for racial balancing:

> If the Law School is admitting between 91 and 108 African-Americans in order to achieve "critical mass," thereby preventing African-American students from feeling "isolated or like spokespersons for their race," *one would think that a number of the same order of magnitude would be necessary to accomplish the same purpose for Hispanics and Native Americans*. . . . In order for this pattern of admission to be consistent . . . one would have to believe that the objectives of "critical mass" offered by [the law school] are achieved with only half the number of Hispanics and one-sixth the number

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through the mold of Darwinian natural selection, and all he did was "create[] much confusion about Darwin's theory." *Id.* at 70–71. But he did leave his mark on American law. *See* Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

[150] *See* Pamela E. Oliver & Gerald Marwell, *The Paradox of Group Size in Collective Action: A Theory of the Critical Mass*, 53 AM. SOC. REV. 1, 7 (1988) (pointing out that member *characteristics* are more important than group size in reaching the "critical mass" of people needed to take collective social action).

[151] Addis, *supra* note 1, at 134.

[152] Brian N. Lizotte, *The Diversity Rationale: Unprovable, Uncompelling*, 11 MICH. J. RACE & L. 625, 650 (2006) (I hasten to note that, as his title might indicate, Mr. Lizotte intended this statement to make the opposite point.).

[153] Comfort *ex rel* Neumyer Sch. Comm., 263 F. Supp. 2d 209, 264 (D. Mass. 2003) (specifically holding that critical mass is too flexible to be a quota).

[154] Addis, *supra* note 1, at 134.

[155] Grutter v. Bollinger, 539 U.S. 306, 381(2003) (Rehnquist, C.J., dissenting) ("From 1995 through 2000, the Law School admitted between 1,130 and 1,310 students. Of those, between 13 and 19 were Native American, between 91 and 108 were African-American, and between 47 and 56 were Hispanic.").

of Native Americans as compared to African-Americans.[156]

Justice Rehnquist concluded that the disparity "must result from careful race based planning by the Law School,"[157] and that the goal of the admissions plan must have been "not to achieve a 'critical mass,' but to extend offers of admission to members of selected minority groups in proportion to their statistical representation in the applicant pool."[158] This is a powerful argument—how could it be that some racial groups required more students to reach the point of criticality than others?

Justice O'Connor responded only that ultimate minority *enrollment* did not match minority representation in the applicant pool,[159] and while that does distinguish the law school's plan from a quota, it is somewhat beside the point. But Chief Justice Rehnquist made too much of the admissions figures he cited. It is not a great stretch to think that using race as a "plus" factor could reduce, or even undo, the racial skew produced by the "hard" admissions criteria (LSAT score[160] and undergraduate GPA)[161] and yield a racially proportionate student body.[162]

Furthermore, if the concept of critical mass is highly contextual, then the point of criticality might easily differ among minority groups, "given the different historical circumstances under which the various groups suffered exclusions and discrimination, the different grounds for their exclusion . . . as well as the current condition in which they find themselves."[163] For the same reason it is impossible to define "critical mass" without considering the individuals, institutions, and practices involved, it is unrealistic to expect the point of criticality to be the same across all racial groups.

For instance, Justice Thomas pointed out in his dissent that "at Mississippi Valley State University, a public [Historically Black College], only 1.1% of the freshman class in 2001 was white. If [this] is a 'critical mass' of whites . . . then 'critical mass' is indeed a very small proportion."[164] I appreciate his example and draw the opposite conclusion—it shows exactly why context matters. Given the social status of whites, we should expect that it would not take many white

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[156] *Id.* (emphasis added).

[157] *Id.* at 385.

[158] *Id.* at 386.

[159] *See id.* at 336 (majority opinion) (pointing out only that ultimate minority enrollment did not match minority representation in the applicant pool).

[160] *See* Kidder, *supra* note 87, at 1081–82 (concluding that the LSAT "artificially exaggerates educational differences between Whites and students of color"); Eulius Simien, *The Law School Admission Test as a Barrier to Almost Twenty Years of Affirmative Action*, 12 T. MARSHALL L. REV. 359, 376 (1987) (indicating that, from the 1980–81 test season through the 1985–86 season, whites' LSAT scores averaged 32.5, while those of blacks averaged 21.4).

[161] *See Grutter*, 539 U.S. at 318 ("[A] critical mass of underrepresented minority students could not be enrolled if admissions decisions were based primarily on undergraduate GPAs and LSAT scores.").

[162] Addis, *supra* note 1, at 139.

[163] *Id.* at 139–40.

[164] *Grutter*, 539 U.S. at 365 (Thomas, J., dissenting).

students to encourage them "to participate in the classroom" or prevent them from feeling "isolated or like spokespersons for their race."[165]

It is also possible that critical mass operates in the aggregate; although minority groups have different cultures and histories, there may be "a commonality among members of these groups in that their relationship with the majority has been one of exclusion, domination, and devaluation."[166] That is, participation in classroom discussion may be encouraged by "[t]he presence of people with roughly similar experiences in the social and political world, [even] though from different racial or ethnic groups and with specific histories and narratives."[167]

The Fifth Circuit nicely elaborated on the contextual nature of critical mass in the 2011 case *Fisher v. University of Texas*. The *Fisher* plaintiffs "presume[d] that critical mass must have some fixed upper bound that applies across different schools, different degrees, different states, different years, different class sizes, and different racial and ethnic subcomposition."[168] In fact, they brazenly claimed that the 10% critical mass figure suggested by the trial judge in the Virginia Military Institute case[169] should be a ceiling for minority enrollment in *all* critical mass programs.[170] The Fifth Circuit politely dismissed this argument as "confounded by *Grutter*."[171]

Fisher made explicit what *Grutter* only implied: that "there is no reason to assume that critical mass will or should be the same for every racial group or every university."[172] It also insisted that "what constitutes critical mass in the eyes of one school might not suffice at another," and that "whatever levels of minority enrollment sufficed more than a decade ago may no longer constitute critical mass today, given the social changes Texas has undergone during the intervening years."[173] *Fisher* nicely fills in the gaps of *Grutter*'s reasoning and provides explicit judicial support for the flexibility of the critical mass doctrine.

On the other hand, the Chief Justice was undeniably right when he protested that the Michigan law school "offer[ed] no race-specific reasons for such disparities."[174] The *theory* of critical mass stands up to the *Grutter* dissenters' indictments of it,[175] but "the legally cognizable

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[165] *See id.* at 318–19 (majority opinion).

[166] Addis, *supra* note 1, at 140.

[167] *Id.*

[168] Fisher v. Univ. of Tex., 631 F.3d 213, 243 (5th Cir. 2011).

[169] *See* United States v. Virginia, 766 F. Supp. 1407, 1437–38 (W.D. Virginia 1991) ("[I]t appears that VMI would be able to achieve at least 10% female enrollment while maintaining its ROTC requirements. This would be a sufficient "critical mass" to provide the female cadets with a positive educational experience.").

[170] *Fisher*, 631 F.3d at 244.

[171] *Id.*

[172] *Id.* at 238.

[173] *Id.* at 244.

[174] *Grutter*, 539 U.S. at 381 (Rehnquist, C.J., dissenting).

[175] I have discussed only two of their principal objections. Justice Thomas raised several other issues

interest—attaining a critical mass of underrepresented minority students—'is defined by reference to the educational benefits that diversity is designed to produce.'"[176] The law school's use of critical mass cannot withstand constitutional scrutiny unless the plan *actually* produces the educational benefits of diversity.

V. EMPIRICAL EVIDENCE OF THE EDUCATIONAL BENEFITS OF DIVERSITY

The University of Michigan law school itself defined critical mass "by reference to the educational benefits that diversity is designed to produce."[177] An analysis of the plan, then, must ask whether diversity leads to the purported benefits.

Increasing the number of minorities in a class, by itself, does nothing more than alter the aesthetic of the student body.[178] Unsurprisingly, "numeric diversity" (or "structural diversity") alone bears little correlation to positive educational outcomes.[179] Indeed, the author of the study relied upon most heavily by the University of Michigan, conceded that "[s]tructural diversity is essential but, by itself, usually not sufficient to produce substantial benefits."[180] Diversity *experiences* are the key to achieving educational benefits: "[I]nstitutions of higher education must bring diverse students together, provide stimulating courses covering historical, cultural, and social bases of diversity and community, and create opportunities and expectations for students to interact across racial and other divides."[181]

The need for more than the mere presence of minorities is consistent with the notion of diversity embraced by the Supreme Court in *Grutter*: "[T]he Law School's admissions policy promotes cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races."[182] A difficult two-stage question thus emerges: Does increased numeric diversity lead to more diversity experiences, and do those experiences lead to educational benefits?

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in his dissent, but they are outside the scope of this Note.

[176] *Fisher*, 631 F.3d at 245 (quoting *Grutter*, 539 U.S. at 330).

[177] *Grutter*, 539 U.S. at 300 (majority opinion).

[178] *See* Miles, *supra* note 6, at 259 ("Quite simply, no purpose is served by diversity alone. Diversity for diversity's sake is futile—and may even be harmful.").

[179] Justin Pidot, Note, *Intuition or Proof: The Social Science Justification for the Diversity Rationale in* Grutter v. Bollinger *and* Gratz v. Bollinger, 59 STAN. L. REV. 761, 768 (2006) (citing ALEXANDER W. ASTIN, WHAT MATTERS IN COLLEGE? FOUR CRITICAL YEARS REVISITED 362 (1993)).

[180] Patricia Gurin, *The Compelling Need for Diversity in Higher Education*, 5 MICH. J. RACE & L. 363, 377 (1999).

[181] *Id.*

[182] *Grutter*, 539 U.S. at 330 (internal quotation marks omitted).

There is "modest support for the intuitively appealing idea that increased numeric diversity will lead to increased diversity experiences."[183] In *The Shape of the River*, a frequently cited study on diversity in higher education, William Bowen and Derek Bok claim that "there is an unmistakable association between the relative size of the black student population and the degree of interaction between white and black students."[184] But their study must be approached with caution: "What Bowen and Bok have written is, in many ways, a brief for the continuation of the policies whose consequences they are examining. . . . [B]oth have for many years strongly supported race-sensitive admission policies. That support colors their analysis at nearly every point."[185] For instance, their study's reliance on an admittedly "small number of institutional observations"[186] undermines confidence in its conclusion.[187]

Another study by Mitchell Chang makes the same finding.[188] Disappointingly, in the Chang study, numeric diversity could account for only 1.5% of the increase in cross-racial socialization and 0.05% of the increase in discussion of racial issues.[189] These findings are "weaker than we would hope in establishing the first link in a two-stage causal story."[190] But since no study—and no theory—suggests the opposite,[191] the Chang and Bowen and Bok studies provide at least some validation for the intuitively comfortable notion that greater numeric diversity leads to more diversity experiences.[192]

Grutter, and most of the studies it cited, focused instead on the link between diversity and positive educational outcomes: "[N]umerous studies show that student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals."[193] The most important study presented in the briefs was by Patricia Gurin, a professor at the University of Michigan with extensive experience in social psychological research.[194] Her study concluded:

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[183] Pidot, *supra* note 179, at 783.

[184] WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 234 (1998). The Bowen and Bok study examined "the relation between the share of the student body that was black and the fraction of the white student body that came to know well two or more black students." *Id.*

[185] Terrance Sandalow, *The Shape of the River*, 97 MICH. L. REV. 1874, 1876 (1999).

[186] BOWEN & BOK, *supra* note 184, at 234.

[187] Pidot, *supra* note 179, at 782–83. For a fantastic book review of *Shape of the River*, see Sandalow, *supra* note 185.

[188] Mitchell J. Chang, *The Positive Educational Effects of Racial Diversity on Campus*, *in* DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 175, 181 (Gary Orfield ed., 2001) [hereinafter DIVERSITY CHALLENGED] (finding a correlation between racial diversity with (1) cross-racial socializing and (2) discussion of racial issues).

[189] *Id.*

[190] Pidot, *supra* note 179, at 782.

[191] *Id.* at 783.

[192] *Id.*

[193] Grutter v. Bollinger, 539 U.S. 306, 330 (2003) (internal quotation marks omitted).

[194] *See* Gurin, *supra* note 180, at 363.

> A racially and ethnically diverse university student body has far-ranging and significant benefits for all students, non-minorities and minorities alike. Students learn better in a diverse educational environment, and they are better prepared to become active participants in our pluralistic, democratic society once they leave such a setting. In fact, *patterns of racial segregation and separation . . . can be broken by diversity experiences in higher education.*[195]

In support of this bold claim, the Gurin report examined "classroom diversity" (defined by enrollment in ethnic studies courses) and "informal interactional diversity" (including both close friendships and general interracial interactions) across three data sets.[196] The report analyzed the correlation between these two diversity metrics and "learning and democracy outcomes"[197] and found "strong evidence" linking diversity to both types of positive outcomes.[198]

There are many flaws in Gurin's report. First of all, it muddles the two-step question, "provid[ing] no empirical evidence linking increased numerical diversity and diversity experience."[199] Second, sheer enrollment in ethnic studies courses makes an unlikely proxy for classroom diversity.[200] Third, because there were few black and Hispanic students in her sample, Gurin "adopts a different threshold of significance for her analysis of black and Latina/o students than for white students—using a threshold of significance of $p<0.10$ for her minority data."[201] A threshold of $p<0.10$ means that the pattern exhibited by the data could be expected to occur at random 10% of the time, even without any relationship between the variables. This is particularly significant because "Gurin often finds correlations between diversity and her outcomes for minority students in 20–30% of her models, alarmingly close to the number of significant results one would expect to see given a random distribution."[202] Fourth, and perhaps most importantly, the report found only mixed outcomes for black and Hispanic students.[203]

The Chang study, discussed above, attempts to link numeric diversity to diversity experiences, but it suffers from some of the same

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[195] *Id.* at 364 (emphasis added).

[196] *Id.* at 382.

[197] *Id.* at 383. She defined "learning outcomes" as "engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills." *Id.* at 365. "Democracy outcomes" represented students' ability to "understand and consider multiple perspectives, deal with the conflicts that different perspectives sometimes create, and appreciate the common values and integrative forces that harness differences in pursuit of the common good." *Id.*

[198] *Id.* at 388, 399.

[199] *See* Pidot, *supra* note 179, at 778.

[200] *Id.* at 771 ("[U]sing [ethnic studies classes] as a proxy for the presence of racial diversity in the classroom hopelessly entangles effects of racial and ethnic heterogeneity with effects of particular curricular materials.").

[201] *Id.* at 775. Gurin used a threshold of $p<0.05$ for her analysis of white students.

[202] *Id.* at 775 n.80.

[203] *See id.* at 775–76.

flaws. For example, Chang uses a "discussion of racial issues" metric to measure diversity experiences.[204] But "such discussions can occur between members of the same race, [so] it is not clear whether it is cross-racial conversation or the subject matter of discussion that is driving these results."[205] A study by Sylvia Hurtado reports that students who studied with students of other races reported growth in all of seven civic outcomes, five job-related outcomes, and eight learning outcomes.[206] But the Hurtado study also suffers from small sample size, a small set of control variables, and small-magnitude results.[207]

A contrary study actually found "an *inverse* relationship between enrollment diversity and evaluations of educational quality by students, faculty, and administrators."[208] Justice Thomas even thought it persuasive enough to include in his dissent.[209] But this study used data from 140 colleges and universities, while "[o]nly the most selective colleges in the country use race-conscious admissions programs, and such schools only account for approximately 4% of the annual number of black baccalaureate degrees."[210] It is likely, therefore, that the results are "dominated by schools that have no race-conscious admissions."[211]

Paul Brest, the former dean of Stanford Law School, has observed that while diversity is valuable, "the evidence is impressionistic and the conclusions are speculative, or perhaps just hopeful."[212] Can we draw any more than that from all these studies? As Pidot laments, very little:

> Despite all of these data, *no clear picture emerges*. Virtually all of the studies have some degree of methodological flaw, and, at best, correlations exist between certain types of experiences (which may or may not be correlated with numeric diversity) and certain positive outcomes. Even these correlations, however, explain little of the variance in outcomes.

In aggregate, little data demonstrate a link between diversity and positive outcomes for students of color. Gurin's findings are mixed at best, and use a low threshold of significance. Other studies did not distinguish outcomes for white students and students of color.[213]

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[204] Pidot, *supra* note 179, at 780.

[205] *Id.*

[206] Sylvia Hurtado, *Linking Diversity and Educational Purpose: How Diversity Affects the Classroom Environment and Student Development*, *in* DIVERSITY CHALLENGED, *supra* note 188, at 187, 197.

[207] Pidot, *supra* note 179, at 781.

[208] Stanley Rothman, Seymour Martin Lipset & Neil Nevitte, *Does Enrollment Diversity Improve University Education?*, 15 INT'L J. PUB. OPINION RES. 8, 16 (2003) (emphasis added).

[209] *See* Grutter v. Bollinger, 539 U.S. 306, 364 (Thomas, J., dissenting).

[210] Pidot, *supra* note 179, at 784.

[211] *Id.*

[212] Brest, *supra* note 131, at 690–91.

[213] Pidot, *supra* note 179, at 794 (emphasis added).

VI. WHAT'S REALLY BEHIND THE *GRUTTER* DECISION

It seems inescapable that the primary factor in both *Grutter* and *Bakke* was the Justices' intuition. Recall Justice Powell's statement that an "atmosphere of speculation, experiment and creation . . . is *widely believed* to be promoted by a diverse student body."[214] His support consists entirely of platitudes. "People do not learn very much when they are surrounded only by the likes of themselves,"[215] he says in a footnote. He echoes the determination of the Harvard admissions plan that "[a] farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer."[216]

Justice Powell's opinion was the only one that addressed diversity in *Bakke*, and no other Justice joined in it, making his conclusory approach even more disappointing:

> Justice Powell simply took as gospel the text preached by the higher education establishment. He did not require that the parties supporting affirmative action and diversity actually document the extent to which their intuition about these matters was supported by a detailed accounting of the actual benefits that would be attained. Nor did he ask them to provide any evidence that such outcomes actually occurred.[217]

Professor Heise of Cornell Law School asserts that the *Grutter* Court, on the contrary, "readily engaged with the social science evidence."[218] Professor Killenbeck of the University of Arkansas School of Law argues that Justice O'Connor "did not simply note and embrace the Michigan Law School plan . . . . Instead, she made the transition from educational theory to educational fact, stressing that the actual benefits for all students enrolled in a racially diverse educational setting are 'substantial' and are 'not theoretical but real.'"[219]

What these commentators accept as "ready engagement" is indistinguishable from utter question-begging. Justice O'Connor's treatment of the studies is limited to two sentences.[220] She does discuss

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[214] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (emphasis added) (internal quotation marks omitted).

[215] *See id.* at 312 n.48 (quoting president of Princeton University, who was quoting a former student).

[216] *Id.* at 316.

[217] Killenbeck, *supra* note 56, at 29.

[218] Michael Heise, *Judicial Decision-Making, Social Science Evidence, and Equal Educational Opportunity: Uneasy Relations and Uncertain Futures*, 31 SEATTLE U. L. REV. 863, 864 (2008).

[219] Killenbeck, *supra* note 56, at 29. *See also id.* at 28 ("If we compare the[ir] approach[es] . . . it becomes clear that *Grutter* is *Bakke* with teeth.").

[220] *See* Grutter v. Bollinger, 539 U.S. 306, 330 (2003) ("The Law School's claim of a compelling interest is further bolstered by its *amici*, who point to the educational benefits that flow from student body diversity. In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and 'better prepares students

the amicus briefs submitted by businesses and the military in more detail, but "these briefs advanced interests . . . that were not advanced by the University"[221] and had nothing to do with diversity's educational benefits at all.

There were many more studies on this issue than the ones I have described; Justice O'Connor did not explain why she found some of them convincing and some unconvincing.[222] Justice Thomas's dissent also failed to explain why the contrary study was persuasive and the other studies were not,[223] so it appears that the opposing Justices were playing the same game. None of them took care "to meaningfully analyze the data or refute the science contrary to their respective positions."[224] I suspect that Justice O'Connor's inadequate treatment of the studies was intentional, and that she referred to a compelling interest in "diversity" (instead of the "educational benefits of diversity") because she realized the data could not support a causal relationship between numerical diversity and its benefits.

The interaction between the law and social science has an uncomfortable history. First, these two fields use completely different standards. In social science, proof is impossible and is not attempted; given this impossibility, *Grutter*'s "proclamation that 'the educational benefits that diversity is designed to produce . . . are substantial' is not phrased with requisite caution. The Court proclaimed a compelling interest in the benefits of student body diversity only by relying on evidence that it is unlikely diversity has no effect."[225]

Second, change occurs in social science and constitutional law not only at different paces, but also in qualitatively different ways. Social science is flexible enough to accommodate change in a way that constitutional law is not.[226] Third, weighing empirical evidence is simply not an appropriate function of the judiciary: "Litigation's inherently adversarial context is ill-designed for a careful review of potentially conflicting research findings."[227] Judges act more "as legislators when they use evidence to choose a particular side."[228]

What emerges is a strong indication that the social-science evidence in *Grutter* was used "as a cover to lend an appearance of objectivity to a decision made on normative grounds, to dart political controversy."[229] Justice O'Connor is a shrewd politician, "sensitive to social and political

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for an increasingly diverse workforce and society, and better prepares them as professionals.").

[221] Neal Devins, *Explaining* Grutter v. Bollinger, 152 U. PA. L. REV. 347, 377 (2003).

[222] Pidot, *supra* note 179, at 805.

[223] *See Grutter*, 539 U.S. at 364 (Thomas, J., dissenting).

[224] Pidot, *supra* note 179, at 807.

[225] Lizotte, *supra* note 152, at 630.

[226] *See* Heise, *supra* note 218, at 884. *See also* Pidot, *supra* note 170, at 806 ("If the social science of tomorrow somehow disproves the diversity rationale, will Barbara Grutter suddenly have suffered a constitutional injury?").

[227] *See* Heise, *supra* note 218, at 884.

[228] Lizotte, *supra* note 152, at 630.

[229] *Id.* at 668.

forces."[230] The *Grutter* Court faced "emphatic, near-unanimous reaffirmation of affirmative action."[231] The amicus briefs filed in *Grutter* supported the university by a four-to-one margin.[232] Many members of the House and Senate supported the university, and none opposed it.[233] The briefs of states supported the university 23–1. The university's other supporters included "labor, education, and civil-rights interests . . . Fortune 500 companies . . . [and] a coalition of former high-ranking officers and civilian leaders of the military."[234] Ninety-one colleges and universities filed briefs supporting the law school's plan, and none opposed it.[235] The brief by the Bush Administration "sought to steer a middle path on racial preferences,"[236] focusing on the narrow-tailoring requirement;[237] It appeared to take for granted that the use of race in admissions was sometimes justified.[238] Even two of the dissenting Justices accepted that the educational benefits of diversity could constitute a compelling interest.[239]

Inertia was likely at work too: "[A]t some point something becomes . . . settled, and institutions have changed the way they do work around a precedent and . . . it would be highly disruptive to change it."[240] *Grutter* reflected a desire to avoid that disruption: "Since . . . *Bakke*, Justice Powell's opinion . . . has served as the touchstone for constitutional analysis of race-conscious admissions policies. Public and private universities across the nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies."[241] Aside from the majority Justices' own belief that

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[230] Devins, *supra* note 221, at 349–50 (noting that "swing" Justices "seem to look to signals sent to the Court by elected officials, elites, and the American people in sorting out their opinions").

[231] *Id.* at 369.

[232] *Id.* at 366 ("One hundred two amicus briefs were filed in Grutter and Gratz—eighty-three supporting the University of Michigan and nineteen supporting the petitioners.").

[233] *Id.* at 367.

[234] *Id.* at 368–69.

[235] Devins, *supra* note 221, at 368.

[236] *Id.* at 371.

[237] Brief of Amicus Curiae United States at 9, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241).

[238] *Id.* at 8 ("Ensuring that public institutions, especially educational institutions, are open and accessible to a broad and diverse array of individuals, including individuals of all races and ethnicities, is an important and entirely legitimate government objective.").

[239] *See* Grutter v. Bollinger, 539 U.S. 306, 392–93 (2003) (Kennedy, J., dissenting) ("There is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity."); *id.* at 378–79 (Rehnquist, C.J., dissenting) ("I agree with the Court that, 'in the limited circumstance when drawing racial distinctions is permissible,' the government must ensure that its means are narrowly tailored to achieve a compelling state interest.").

[240] Brest, *supra* note 131, at 694. *See also* Dickerson v. United States, 530 U.S. 428, 443 (2000) ("Whether or not we would agree with *Miranda*[]. . . were we [first] addressing the issue [now] . . . stare decisis weigh[s] heavily against overruling it . . . . *Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."); Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 856 (1992) ("[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion [guaranteed by *Roe v. Wade*].").

[241] *Grutter*, 539 U.S. at 323.

universities should be allowed to use race to achieve diversity, they were simply too pragmatic to take on such strong momentum and emphatic political will.[242]

VII. CONCLUSION

Justice Scalia correctly characterized affirmative action as an area full of "pretense" and "self-delusion."[243] The University of Michigan Law School's critical-mass plan was almost certainly dishonest; as Justice Souter recognized in *Gratz*, the university's true motivation was to remedy societal discrimination.[244] But even if the law school's reliance on critical mass was not a sham, it was certainly a shame: "Emphasizing the importance of diversity conveniently sidesteps the debate over whether our institutions are truly meritorious."[245] The diversity rationale for affirmative action "concurs in and reiterates 'the big lie,' the anti-affirmative action argument that pretends that white supremacy is extinct and presupposes a color-blind world, a world in which race-conscious remedies become invidious discrimination."[246]

The majority Justices in *Grutter* could have accomplished a great deal more if they had acknowledged the poisonous consequences of near-exclusive reliance on objective admissions criteria[247] and included a frank discussion of why those criteria produce racially skewed results.[248] Instead, their self-congratulatory opinion invoked the most uninspiring

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[242] Particularly Justice O'Connor, who "had never voted to approve a race-based preference scheme" before *Grutter*. Devins, *supra* note 221, at 377.

[243] Scalia, *supra* note 57, at 148.

[244] *See* Gratz v. Bollinger, 539 U.S. 244, 297–98 (2003) (Souter, J., dissenting) (noting the "disadvantage of deliberate obfuscation" in many affirmative-action plans and praising the University of Michigan's undergraduate admissions program, which awarded a fixed point bonus to minority applicants, for its frankness); *id.* at 304–05 (Ginsburg, J., dissenting) ("Without recourse to such plans, institutions of higher education may resort to camouflage. . . . If honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises."). *See also* Garry, *supra* note 109, at 656–57 ("If indeed diversity is 'at the heart' of the Law School's educational mission . . . it makes no sense that the school is operating an admissions system that does not on its own produce the desired diversity . . . .").

[245] Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 958 (2001).

[246] *Id.* at 953.

[247] *See* Grutter v. Bollinger, 539 U.S. 306, 370 (2003) (Thomas, J., dissenting) ("The Law School's continued adherence to measures it knows produce racially skewed results is not entitled to deference by this Court. . . . Having decided to use the LSAT, the Law School must accept the constitutional burdens that come with this decision.").

[248] *See* R. Richard Banks, *Meritocratic Values and Racial Outcomes: Defending Class-Based College Admissions*, 79 N.C. L. REV. 1029, 1034 ("Merit is a functional concept—no quality or characteristic is inherently meritorious. Merit is necessarily defined with respect to particular contexts, goals, and values."); Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711, 1721 (1995) ("Merit is what the victors impose."); Sandalow, *supra* note 185, at 1914 (citing Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007, 2052 (1991)) ("[M]erit standards for student admissions and faculty appointments are but a 'gate built by a white male hegemony that requires a password in the white man's voice for passage.'").

justification for affirmative action there is:

> [A]ffirmative action is a fundamentally moral policy. If affirmative action is legal, it is legal because equal protection permits, maybe demands, that the gatekeepers of national power and wealth acknowledge and correct for their own past discriminatory actions, and that they grant future access to power and wealth to persons who might otherwise be excluded. The diversity rationale, in contrast, is a purely functional justification, conspicuously lacking the moral component. It is a consolation prize.[249]

The majority opinion's unsatisfying analysis and its "refusal to decide whether Justice Powell's racial diversity rationale is binding Supreme Court precedent . . . create[] the impression that the Court was predisposed to reach a specific result on race-based diversity in higher education."[250] If the majority Justices were pre-committed to upholding the law school's plan, they should have at least defended the theory of critical mass as energetically as the dissenters attacked it. Treating the definition and constitutionality of critical mass as axiomatic will make it even harder for universities to develop meaningful and forthright affirmative-action programs. The only safe course for schools, it seems, is to follow the Michigan plan to the letter, paradoxically disabling universities from exercising the expertise, judgment, and autonomy the Supreme Court has deemed so important. I regret that my conclusion is this: The only thing to like about *Grutter* is that it could have been worse.

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[249] Lizotte, *supra* note 152, at 668.

[250] *See* L. Darnell Weeden, *After* Grutter v. Bollinger *Higher Education Must Keep Its Eyes on the Tainted Diversity Prize Legacy*, 19 BYU J. PUB. L. 161, 171 (2004).