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# No Angels in Academe: Ending the Constitutional Deference to Public Higher Education

William E. Thro  
*University of Kentucky*

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# NO ANGELS IN ACADEME: ENDING THE CONSTITUTIONAL DEFERENCE TO PUBLIC HIGHER EDUCATION

WILLIAM E. THRO\*

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. —James Madison<sup>1</sup>

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\* General Counsel of the University of Kentucky, former Solicitor General of Virginia (2004-08), and previously Associate Professor of Constitutional Studies, Christopher Newport University. B.A., Hanover College (1986); M.A., the University of Melbourne (1988); J.D., the University of Virginia (1990). Mr. Thro writes in his personal capacity and his views do not necessarily reflect the views of the University of Kentucky. Mr. Thro thanks Linda Speakman for her editorial assistance.

1. THE FEDERALIST NO. 51 (James Madison). Madison’s views on the nature of humanity and the need to control the government reflect the influence of John Witherspoon, arguably the greatest Calvinist thinker of the Eighteenth Century and Madison’s graduate tutor in Hebrew and political philosophy. See Ian Spier, *The Calvinist Roots of American Social Order: Calvin, Witherspoon, and Madison*, PUB. DISCOURSE (Apr. 13, 2017), <http://www.thepublicdiscourse.com/2017/04/19116/>.

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## INTRODUCTION

The Constitution reflects a Calvinist perspective<sup>2</sup>—a fundamental distrust of humans and human institutions.<sup>3</sup> Neither the People nor the People’s Agents are angels;<sup>4</sup> they are flawed individuals who will pursue

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2. As Mark David Hall demonstrated, Calvinist theology (sometimes called reformed theology) was one of the foundations of the Constitution. MARK DAVID HALL, ROGER SHERMAN AND THE CREATION OF THE AMERICAN REPUBLIC 12-40 (2013). This is not to discount the influence of Locke or Montesquieu, but simply to acknowledge the Framing Generation had great awareness of the Calvinist thread of the Protestant tradition. As Hall explained, “American leaders were familiar with Locke, but few thought his political philosophy was at odds with traditional Christian or Calvinist political ideas.” *Id.* at 24. Rather, “Locke’s political philosophy is best understood as a logical extension of Protestant resistance literature rather than as a radical departure from it.” *Id.* at 21.

3. As Professor Hamilton explained:

One of the dominating themes of Calvin’s theology is the fundamental distrust of human motives, beliefs, and actions. On Calvin’s terms, there is never a moment in human history when that which is human can be trusted blindly as a force for good. Humans may try to achieve good, but there are no tricks, no imaginative role-playing, and no social organizations that can guarantee the generation of good. . . . Thus, Calvinism counsels in favor of diligent surveillance of one’s own and other’s actions, and it also presupposes the value of the law (both biblical and secular) to guide human behavior away from its propensity to do wrong.

Marci Hamilton, *The Calvinist Paradox of Distrust and Hope at the Constitutional Convention*, in CHRISTIAN PERSP. ON LEGAL THOUGHT 189, 189 (Michael W. McConnell, Robert F. Corchran, Jr., & Angela C. Carmella, eds., 2001).

4. In contrast, those who advocated for a new European Constitution viewed humanity as inherently good. See GEORGE WEIGEL, *THE CUBE AND THE CATHEDRAL* (2005). Robert Keegan has suggested that the foreign policy disputes between the United States and Europe are a product of different perspectives on humanity. See ROBERT KEEGAN, *OF PARADISE AND POWER* (2003).

self-interest, abuse power, and engage in corruption.<sup>5</sup> The Constitution protects the liberty of the People—individually and collectively—from the People’s Agents and the ever-shifting political winds.<sup>6</sup> Instead of an all-powerful national government,<sup>7</sup> the Constitution “split the atom of sovereignty . . . establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.”<sup>8</sup> Rather than combining executive, legislative, and judicial power in a single parliament dominated by the majority party of the day,<sup>9</sup> the Constitution “protects us from our own best intentions” by preventing the concentration of “power in one location as an expedient solution to the crisis of the day.”<sup>10</sup> Because “all . . . are created equal and endowed by their creator with certain unalienable rights,”<sup>11</sup> the Constitution “withdraws certain subjects from the vicissitudes of political controversy” and “places them beyond the reach of majorities and officials.”<sup>12</sup>

When the Will of the People’s Agents as expressed in the statutes or executive actions contradicts the Will of the People as expressed in the

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5. See R.C. SPROUL, WILLING TO BELIEVE: THE CONTROVERSY OVER FREE WILL 52-55 (1997).

6. See RANDY BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY & SOVEREIGNTY OF WE THE PEOPLE (2016).

7. See generally *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819).

8. *U.S. Term Limits v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

9. South Africa’s Constitution illustrates this point. First, Constitutional Court—the highest judicial body—is commanded to “promote the values that underlie an open and democratic society based on human dignity, equality, and freedom.” S. AFR. CONST., 1996. Second, a two-thirds majority of the National Assembly can amend most provisions of the Constitution at any time. *Id.* If one party holds more than two-thirds of the seats—a common occurrence during the first two decades of multi-racial democracy—revision of the nation’s fundamental law can be accomplished by a single political party. *Id.* Third, the National Assembly—the legislature—is elected by proportional representation, which allows parties with low levels of support to obtain seats. *Id.* Fourth, because the President is the leader of the party or the coalition that has a majority in the National Assembly, there is neither a legislative check on the executive nor an executive check on the legislature. See *id.* Fifth, although South Africa is nominally a federation, the individual provinces are subordinate to the will of the National Government, which, as explained above, is controlled by democratic majorities. See *id.*

Of course, South Africa does have a comprehensive Bill of Rights and the Constitutional Court vigorously enforces those rights. Indeed, the Constitutional Court invalidated the initial Constitution. See *In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC) (S. Afr.). However, this judicial check is the only real check on the power of a democratic majority. For South Africa, the Bill of Rights creates limits on government rather than merely confirming the limits that are implicit in the structure. In that sense, South Africa is fundamentally different from the Augustinian vision embodied in the United States Constitution.

10. *New York v. United States*, 505 U.S. 144, 187 (1992).

11. DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

12. *W. Va State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

Constitution,<sup>13</sup> then the judiciary must ensure that the Constitution prevails.<sup>14</sup> Because judicial review is inherently anti-democratic<sup>15</sup> and because judges are flawed humans<sup>16</sup> who also need to be limited,<sup>17</sup> the judiciary must apply the original public meaning of the constitutional text<sup>18</sup> or, when such an interpretation is inconclusive, a constitutional construction consistent with the original public meaning.<sup>19</sup> Judicial review must recognize constitutional actors are humans, not angels; there must be doubt, not deference.<sup>20</sup> Although there have been occasions or even eras when the Court has failed the

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13. Although we frequently say that a statute or executive action violates the Constitution, only constitutional actors—human beings—can violate the Constitution. A claim that a statute violates the Constitution is really a claim that the legislature violated the Constitution. A claim that an executive action violates the Constitution is really a claim that a particular executive branch official violated the Constitution. *See* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209 (2010); Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005 (2011); *see also* William E. Thro, *Rosenkranz' Constitutional Subjects & School Finance Litigation*, 260 ED. LAW REP. 1 (2010) (applying Rosenkranz' theory to school finance litigation).

14. THE FEDERALIST NO. 78 (Alexander Hamilton).

15. *See* JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 4 (1982).

16. Recognizing the dangers of rule by a “bevy of platonic guardians,” *Griswold v. Connecticut*, 381 U.S. 479, 526 (1965) (Black, J., dissenting) (citing *LEARNED HAND, THE BILL OF RIGHTS* (1958)), judges are not “omni-compet[ant]” and, thus, cannot micromanage government departments. *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 536 (7th Cir. 1997).

17. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989). *See also* RALPH ROSSUM, *ANTONIN SCALIA'S JURISPRUDENCE: TEXT AND TRADITION* 27-29 (2006).

18. While originalism offers the best method of restraint, its effectiveness ultimately depends upon the willingness of the judge to be restrained. If a judge wishes to refrain from imposing his policy views, then adhering to originalism is one way—the best way—to reach that result. Will Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. (forthcoming 2018).

19. *See* RANDY BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004).

20. For an analysis of these contrasting approaches in the context of a state constitutional challenge to a school finance system, see William E. Thro & Carlee Poston Escue, *Doubt or Deference: Comparing the South Dakota and Washington School Finance Decisions*, 281 EDUC. L. REP. 771 (2012).

Republic,<sup>21</sup> the Court generally has enforced the division of sovereignty,<sup>22</sup> the separation of powers,<sup>23</sup> and the guarantees of the Bill of Rights.<sup>24</sup>

Yet, with respect to academe, a different constitutional paradigm prevails. In the view of the judiciary, higher education administrators are “angels”—entitled to greater deference than constitutional actors in other spheres.<sup>25</sup> For example, constitutional actors in academe may: (1) utilize racial classifications for different purposes and with far greater deference;<sup>26</sup> (2) force religious groups to admit those who disagree with the group’s basic faith tenets;<sup>27</sup> and (3) impose life-altering punishments with little due process protections.<sup>28</sup>

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21. While there is general agreement that the Court has failed in its role, there is profound disagreement as to which cases or eras represent failure. The landmark beacon of liberty for some is a constitutional betrayal for others.

22. Because “the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom,” *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., joined by O’Connor, J., concurring), the Court has intervened to maintain the sovereign prerogatives of both the States and the National Government. In order to preserve the sovereignty of the National Government, the Court has prevented the States from imposing term limits on members of Congress, *U.S. Term Limits v. Thornton*, 514 U.S. 779, 800-01 (1995), and instructing members of Congress as to how to vote on certain issues, *Cook v. Gralike*, 531 U.S. 510, 519-22, (2001). Similarly, it has invalidated state laws that infringe on the right to travel, *Saenz v. Roe*, 526 U.S. 489 (1999), undermine the Nation’s foreign policy, *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372-74 (2000), and exempt a State from generally applicable regulations of interstate commerce, *Reno v. Condon*, 528 U.S. 141, 150 (2000). Conversely, recognizing that “the erosion of state sovereignty is likely to occur a step at a time,” *South Carolina v. Baker* 485 U.S. 505, 533 (1988) (O’Connor, J., dissenting), the Supreme Court has declared that the National Government may not compel the States to pass particular legislation, *New York v. United States*, 505 U.S. 144, 162 (1992), require state officials to enforce federal law, *Printz v. United States*, 521 U.S. 898, 935 (1997), dictate the location of the State Capitol, *Coyle v. Smith*, 221 U.S. 559, 579 (1911), or regulate purely local matters, *United States v. Morrison*, 529 U.S. 598, 617-19 (2000); *Lopez*, 514 U.S. at 561 n.3.

23. “The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, ‘shall take Care that the Laws be faithfully executed,’ personally and through officers whom he appoints. . . .” *Printz*, 521 U.S. at 922. Thus, Congress may not interfere with the President’s enforcement of the law, *see Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983), and the President may not interfere with Congress’ ability to legislate. *See Clinton v. New York*, 524 U.S. 417 (1998).

24. Although various justices have disagreed as to exactly how the Bill of Rights applies to the States, the Court has found that virtually all of the Bill of Rights applies to the States. *See McDonald v. City of Chicago*, 561 U.S. 742, 759-61 (2010).

25. To be sure, there are some contexts—notably the Freedom of Speech—where the judiciary treats higher education administrators in the same manner as other constitutional actors. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (holding that public university violated First Amendment by excluding religious publication from university’s funding mechanism).

26. *See infra* Part I(A).

27. *See infra* Part I(B).

28. *See infra* Part I(C).

This Article's thesis is simple—because public university administrators are no more angelic than other constitutional actors are, the judiciary's deference to higher education officials must end. There is no reason for greater deference to the academy than to other governmental units. Instead, judges must subject higher education administrators to the same skepticism and doubt as other constitutional actors.

This Article has three parts. Part I examines how the Courts treat academe's constitutional actors more deferentially than constitutional actors in other spheres. Specifically, it discusses different approaches concerning racial preferences, student religious groups' freedom of association, and due process for students facing life-altering penalties. Part II details the consequences of the judiciary's unwarranted deference to higher education. Racial preferences have significant costs, frequently do not help disadvantaged students, and are not necessary to the achievement of racial diversity. Forcing religious groups to admit non-believers undermines Confident Pluralism. Diminishing due process protections does nothing to help sexual assault victim-survivors. Part III details the possibility of ending this judicial deference to higher education through state constitutional provisions, federal statutory or regulatory changes, or overruling existing Supreme Court precedents. In particular, it explores the likelihood racial preferences in higher education will be treated the same as racial preferences in other context, student religious groups will have the associational rights as religious organizations outside of academe, and due process protections will be enhanced.

## I. THE JUDICIARY'S DEFERENCE TO HIGHER EDUCATION OFFICIALS

### A. Racial Preferences in Admissions

The Equal Protection Clause,<sup>29</sup> is “essentially a direction that all persons similarly situated . . . be treated alike,”<sup>30</sup> and that the Constitution protects “*persons*, not *groups*.”<sup>31</sup> Indeed, the “rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.”<sup>32</sup> If a program treats everyone equally, there is no equal protection violation.<sup>33</sup> The “general rule is that legislation is presumed to be valid and will be sustained if the classification

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29. U.S. CONST. amend. XIV, § 1.

30. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

31. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (emphasis in original); see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279-80 (1986).

32. *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (emphasis omitted).

33. See *Romer v. Evans*, 517 U.S. 620, 623 (1996) (restating that the Equal Protection Clause enforces the principle that the Constitution neither knows nor tolerates classes among its citizens).

drawn by the statute is rationally related to a legitimate state interest.”<sup>34</sup> This general rule gives way in those rare instances when statutes infringe upon fundamental constitutional rights or utilize “suspect” or “quasi-suspect” classifications.<sup>35</sup>

“One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”<sup>36</sup> Indeed, because racial distinctions “are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality”<sup>37</sup> and are “contrary to our traditions and hence constitutionally suspect,”<sup>38</sup> “all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.”<sup>39</sup> The government’s desire to use racial classifications to help racial minorities does not alter the analysis.<sup>40</sup> Indeed, the Court has “insisted on strict scrutiny in every context, even for so-called ‘benign’ racial classifications, such as race-conscious university admissions policies, race-based preferences in government contracts, and race-based districting intended to improve minority representation.”<sup>41</sup> Instead of presuming that governmental action is constitutional<sup>42</sup> and requiring the challenger to demonstrate otherwise,<sup>43</sup> “the government has the burden of proving that racial classifications ‘are narrowly tailored measures that further compelling governmental interests.’”<sup>44</sup>

Outside of the higher education context, there is only one compelling interest that would justify the use of race—remedying the present day effects of identified past intentional racial discrimination by a particular governmental unit.<sup>45</sup> Just as significantly, the Court has rejected, as a matter of constitutional law, a number of other justifications offered by state and local governments for race-conscious measures: maintaining a racial balance in K-12 education,<sup>46</sup> remedying societal discrimination,<sup>47</sup> and providing

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34. *Cleburne*, 473 U.S. at 440 (citing *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *U.S. R.R. Ret. Board v. Fritz*, 449 U.S. 166, 174-175 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)).

35. *See Cleburne*, 473 U.S. at 440-41.

36. *Rice v. Cayetano*, 528 U.S. 495, 517 (2000).

37. *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

38. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (citing *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Hirabayashi*, 320 U.S. at 100).

39. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

40. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 n. 9 (1982).

41. *Johnson v. California*, 543 U.S. 499, 505 (2005).

42. *Lyng v. Auto. Workers*, 485 U.S. 360, 370 (1988).

43. *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 314-15 (1993).

44. *Johnson*, 543 U.S. at 505 (quoting *Adarand*, 515 U.S. at 227).

45. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 504-05 (1989).

46. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720-21 (2007) (citations omitted).

47. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986).

minority K-12 students with faculty role models.<sup>48</sup> If the government asserts there are present day effects of past intentional discrimination, there must be specific findings<sup>49</sup> of actual present-day effects of past discrimination.<sup>50</sup> Although the findings of legislative bodies are generally entitled to great deference,<sup>51</sup> a racial classification cannot rest on a generalized assertion that discrimination exists in society or in a particular agency.<sup>52</sup> Because the concept of underrepresentation “rests upon the ‘completely unrealistic’ assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population,”<sup>53</sup> underrepresentation or disparity is not sufficient to establish “a strong basis in evidence” for present effects of racial discrimination that would permit an agency to take race-conscious action to fashion a remedy consistent with the Constitution.<sup>54</sup> Instead, there must be “some showing of prior discrimination by the *governmental unit involved*. . . .”<sup>55</sup> Findings of discrimination cannot be extrapolated from one governmental unit to another.<sup>56</sup> Nor can findings of discrimination against one racial group be extrapolated to other racial groups.<sup>57</sup> The judiciary rarely upholds governmental racial classifications.<sup>58</sup> When it permits racial classification, the judiciary insists that the racial classification end once the government has eliminated the present day effects of the past discrimination.<sup>59</sup>

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48. *Id.* at 275-76.

49. *Croson*, 488 U.S. at 510-11.

50. *Id.* at 500.

51. *See* *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89 (1955).

52. *See* *McLaughlin v. Florida*, 379 U.S. 184, 190-92 (1964).

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

54. *See generally* *Washington v. Davis*, 426 U.S. 229, 250-52 (1976); *Mayor of Philadelphia v. Educ. Equity League*, 415 U.S. 605, 620 (1974). *Cf. Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991) (“If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury.”).

55. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (emphasis added).

56. *See Croson*, 488 U.S. at 508. *See also* *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995); *Milliken v. Bradley*, 418 U.S. 717, 746 (1974).

57. *See Croson*, 488 U.S. at 506 (“The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination . . . suggests that perhaps the . . . purpose was not in fact to remedy past discrimination.”).

58. *See* *United States v. Paradise*, 480 U.S. 149 (1987). Additionally, the Court has approved—indeed required—the use of racial classifications in K-12 education as a means of remedying the present day effects of previous *de jure* discrimination within the school district. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 23-26 (1971).

59. *See* *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 744, (2007). For a commentary on the higher education implications of the case, see Charles J. Russo & William E. Thro, *Higher Education Implications of Parents Involved for Community Schools*, 35 J. C. & U. L. 239 (2009). For a case reaching a similar result that foreshadowed the Supreme Court’s decision, see *Keyes v. Congress of Hispanic Educators*, 902 F. Supp. 1274 (D. Colo. 1995); *Keyes v. Sch. District No. 1*, 119 F.3d 1437 (10th Cir. 1997) (upholding Colorado Constitutional provision prohibiting the use of race in student assignments).

Yet, in the context of higher education, a different paradigm prevails. First, although other governmental entities may only pursue racial classifications as a means of remedying the present day effects of past intentional discrimination by the governmental entity, public universities have an additional compelling governmental interest—obtaining the educational benefits of a diverse student body in higher education.<sup>60</sup> Second, governmental findings of present day effects of past intentional discrimination receive severe skepticism, but “the decision to pursue ‘the educational benefits that flow from student body diversity’ . . . is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper.”<sup>61</sup> Third, while the Court insists “[t]he higher education dynamic does not change the narrow tailoring analysis of strict scrutiny applicable in other contexts,”<sup>62</sup> its most recent decision suggests merely invoking “the educational benefits of diversity” is sufficient and that it need not identify any metric that would allow a court to determine whether its plan is needed to serve, or is actually serving, those interests.<sup>63</sup> Fourth, although the Court suggested in 2003 there would no need to use race to achieve diversity after 2028,<sup>64</sup> higher education’s pursuit of diversity seems to have no logical endpoint.

## B. Freedom of Association for Student Religious Groups

The right to express a particular viewpoint necessarily includes the right to associate with others who share that view. “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

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60. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 328-30 (2003). Despite what many administrators may think, the Court’s embrace of “diversity” is “not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.” *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978). “Racial balancing is not transformed from ‘patently unconstitutional’ to a compelling state interest simply by relabeling it ‘racial diversity.’” *Parents Involved in Cmty. Schs.*, 551 U.S. at 732 (2007).

61. *Fisher v. Univ. of Tex.*, 133 S.Ct. 2411, 2419 (2013) [hereinafter *Fisher I*] (quoting *Grutter*, 539 U.S. at 330). A university cannot impose a fixed quota or otherwise “define diversity as ‘some specified percentage of a particular group merely because of its race or ethnic origin.’” *Id.* (quoting *Bakke*, 438 U.S. at 307). Once, however, a university gives “a reasoned, principled explanation” for its decision, deference must be given “to the University’s conclusion, based on its experience and expertise, that a diverse student body would serve its educational goals.” *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2208 (2016) [hereinafter *Fisher II*] (citing *Fisher I*, 133 S. Ct. at 2419).

62. *Fisher I*, 133 S. Ct. at 2421.

63. *Fisher II*, 136 S. Ct. at 2215 (Alito, J., joined by Roberts, C.J. and Thomas, J., dissenting).

64. *Grutter*, 539 U.S. at 343.

unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.”<sup>65</sup> “This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas.”<sup>66</sup> “If the government were free to restrict individuals’ ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect.”<sup>67</sup> This freedom of association “is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private.”<sup>68</sup>

“Freedom of association . . . plainly presupposes a freedom not to associate.”<sup>69</sup> “Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association’s being.”<sup>70</sup> “The 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.”<sup>71</sup>

Therefore, government may intrude on the freedom of association only “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.”<sup>72</sup> Courts are required to “examine whether or not the application of the state law would impose any ‘serious burden’ on the organization’s rights of expressive association.”<sup>73</sup> Judges “give deference to an association’s assertions regarding the nature of its expression” and “to an association’s view of what would impair its expression.”<sup>74</sup> It is not necessary for the organization’s core purpose to be expressive or for all members to agree with all aspects of the message.<sup>75</sup> Under this framework, the Court has upheld statutes requiring civic organizations to admit women,<sup>76</sup> but has allowed both parade organizers<sup>77</sup> and the Boy Scouts to exclude homosexuals.<sup>78</sup> The cases have turned on

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65. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

66. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000).

67. *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 68 (2006).

68. *Dale*, 530 U.S. at 648.

69. *Roberts*, 468 U.S. at 623.

70. *Democratic Party of U.S. v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 122 n.22 (1981); *see also Cal. Democratic Party v. Jones*, 530 U.S. 567, 574-75 (2000).

71. *Dale*, 530 U.S. at 648.

72. *Roberts*, 468 U.S. at 623.

73. *Dale*, 530 U.S. at 685.

74. *Id.* at 653.

75. *Id.* at 655.

76. *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 546-47 (1987); *Roberts*, 468 U.S. at 623-27.

77. *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 572-73 (1995).

78. *Dale*, 530 U.S. at 655-60.

whether the “the enforcement of these [policies]” would “materially interfere with the ideas that the organization sought to express.”<sup>79</sup>

While all groups enjoy these constitutional rights to exclude those who disagree with the groups’ objectives,<sup>80</sup> *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC* recognized that the First Amendment “gives special solicitude to the rights of religious organizations. We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization’s freedom to select its own [leaders].”<sup>81</sup> “By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments.”<sup>82</sup> “According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.”<sup>83</sup>

*Hosanna-Tabor* establishes that religious groups have a right of absolute discretion to determine who their leaders will be. Logically, if an organization can restrict its leadership to those who adhere to the faith and basic principles, then the organization ought to be able to impose a similar requirement on membership. Consequently, the necessary inference of *Hosanna-Tabor* is that religious organizations, through the Religion Clauses,<sup>84</sup> have greater associational freedoms than their secular counterparts do.<sup>85</sup>

Yet, in higher education, a different paradigm prevails. In *Christian Legal Society v. Martinez*,<sup>86</sup> a sharply divided Supreme Court held that officials at a public institution in California might require a student religious group to admit all-comers from the student body, including those who disagree with its beliefs, as a condition of being a recognized student organization.<sup>87</sup> Put another way, the Court declared that the government,

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79. *Id.* at 657.

80. The government may not require organizations to surrender this right as a condition of participating in a grant program or receiving some benefit. *See Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2328 (2013).

81. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171, 189 (2012).

82. *Id.* at 188.

83. *Id.* at 188-89.

84. “Responding somewhat incredulously to the government’s theory that whatever rights the church might have derive only from freedom of association, [Justice Scalia] said that ‘there, black on white in the text of the Constitution are special protections for religion.’” Douglas Laycock, *Hosanna-Tabor and the Ministerial Exception*, 35 HARV. J.L. & PUB. POL’Y 839, 855 (2012).

85. Because the government may favor religion and religious entities over non-religion and non-religious entities, such a result would not violate the Establishment Clause. *See Cutter v. Wilkinson*, 544 U.S. 709, 719-24 (2005); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987).

86. *Christian Legal Soc. v. Martinez*, 561 U.S. 661 (2010).

87. *Id.* at 669.

through university officials, might force religious groups to choose between compromising their values and receiving benefits that other student groups receive as a matter of constitutional right. While the government “surely could not demand that all Christian groups admit members who believe that Jesus was merely human,”<sup>88</sup> the government “may impose these very same requirements on students who wish to participate in a forum that is designed to foster the expression of diverse viewpoints.”<sup>89</sup> As Professor Paulsen notes, the “holding is a fundamental negation of the right of Christian campus groups to freedom of speech, to freedom of association, and to the collective free exercise of religion—a First Amendment disaster trifecta.”<sup>90</sup>

### C. Due Process in Student Disciplinary Proceedings

Unlike the legal traditions of other cultures, the Anglo-American-Australasian legal tradition has required procedural due process before government deprives an individual of life, liberty, or property.<sup>91</sup> “Due process is the foundation of any system of justice that seeks a fair outcome. Due process either protects everyone or it protects no one.”<sup>92</sup> Due process prevents arbitrary governmental action,<sup>93</sup> but it is ultimately a search for truth—did the individual actually do the action for which he is accused?<sup>94</sup> All doubts are resolved in favor of the individual.<sup>95</sup> The focus is on preventing

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88. *Id.* at 731 (Alito, J., joined by Roberts, C.J., Scalia & Thomas, JJ., dissenting). *See also id.* at 701 (Stevens, J., concurring).

89. *Id.* at 731 (Alito, J., joined by Roberts, C.J., Scalia & Thomas, JJ., dissenting).

90. Michael Stokes Paulsen, *Disaster: The Worst Religious Freedom Case in Fifty Years*, 24 REGENT U. L. REV. 283, 284 (2012).

91. Compare Roger Alan Boner & William E. Kovacic, *Antitrust Policy in Ukraine*, 31 GEO. WASH. J. INT’L L. & ECON. 1, 6 (1997) (describing the lack of due process in the Ukraine), and Haibo He, *The Dawn of the Due Process Principle in China*, 22 COLUM. J. ASIAN L. 57, 93 (2008) (stating that China does not have a tradition of due process), with Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1211-12 (2005) (describing the distinctive Anglo-American tradition of due process), and Belinda Wells & Michael Burnett, *When Cultures Collide: An Australian Citizen’s Power to Demand the Death Penalty Under Islamic Law*, 22 SYDNEY L. REV. 5, 19 (2000) (describing the application of due process in South Australia and its roots in English history).

92. Betsy DeVos, *Secretary’s Prepared Remarks on Title IX Enforcement*, Antonin Scalia Law School, George Mason University (September 7, 2017).

93. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

94. *See* David A. Harris, *The Constitution and Truth Seeking: A New Theory on Expert Services for Indigent Defendants*, 83 J. CRIM. L. & CRIMINOLOGY 469, 473 (1992) (“[T]he search for truth is the reason the Constitution protects the right to confrontation, the right to compulsory process and the right to put on a defense.”).

95. Henry L. Chambers, Jr., *Reasonable Certainty and Reasonable Doubt*, 81 MARQ. L. REV. 655, 658-59 (1998).

false convictions.<sup>96</sup> As Blackstone noted, it is better for ten guilty men to go free than for one innocent man to be imprisoned.<sup>97</sup>

Due process clearly applies when a public university seeks to expel a student for disciplinary reasons,<sup>98</sup> but the judiciary has allowed universities to apply a less rigorous standard.<sup>99</sup> Despite the life-altering consequences of an expulsion,<sup>100</sup> a state university need not transplant “wholesale . . . the rules of procedure, trial and review which have evolved from the history and experience of courts.”<sup>101</sup> Because student disciplinary hearings “are not criminal trials, and therefore need not take on many of those formalities,”<sup>102</sup> “neither rules of evidence nor rules of civil or criminal procedure need be applied.”<sup>103</sup> Indeed, as long as the student has notice of the charges, an explanation of the evidence against him, opportunity to present his side of the story, and the evidence is sufficient, there is no constitutional violation.<sup>104</sup> Notice requires nothing more “than a statement of the charge against them.”<sup>105</sup> As to the hearing, “[c]ross-examination, the right to counsel, the

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96. See Elizabeth Kaufer Busch, *Sexual Assault: What's Title IX Got To Do With It?*, PERSP. IN POL. SCI. (July 28, 1997), <http://www.tandfonline.com/loi/vpps20> (discussing differences between Due Process approach and the Inquisitorial System).

97. See 4 WILLIAM BLACKSTONE, COMMENTARIES \*358 (“[B]etter that ten guilty persons escape, than that one innocent suffer.”).

98. *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 222-23 (1985). The requirement to provide due process dates from the landmark decision in *Dixon v. Alabama State Board of Education*, 294 F.2d 150, 158-59 (5th Cir. 1961).

99. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). See also *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 633-37 (6th Cir. 2005) (collecting cases and analyzing the amount of process due in student disciplinary cases).

100. See Robert B. Groholski, Comment, *The Right to Representation by Counsel in University Disciplinary Proceedings: A Denial of Due Process Law*, 19 N. ILL. U. L. REV. 739, 754-55 (1999); James M. Picozzi, Note, *University Disciplinary Process: What's Fair, What's Due, and What You Don't Get*, 96 YALE L.J. 2132, 2138 (1987); Lisa Tenerowicz, Note, *Student Misconduct at Private Colleges and Universities: A Roadmap for "Fundamental Fairness" in Disciplinary Proceedings*, 42 B.C. L. REV. 653, 683 (2001). Indeed, in some states, if the student was expelled for sexual assault, that fact is noted on the student transcript. See, e.g., VA. CODE ANN. § 23-9.2:18. Given the potential liability for admitting a known sex offender, it will be difficult for students to transfer to other institutions. See Christopher M. Parent, *Personal Fouls: How Sexual Assault by Football Players Is Exposing Universities to Title IX Liability*, 13 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 617, 634-35 (2003) (explaining the liability that universities are exposed to because of student sexual harassment and suggesting that this may make them more cautious regarding which students they accept). In the Southeastern Conference, an athlete who is disciplined for sexual assault is ineligible to play at any other conference school. 2016-2017 SOUTHEASTERN CONFERENCE CONSTITUTION & BYLAWS, Bylaw 14.1.19.

101. *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976).

102. *Flaim*, 418 F.3d at 635.

103. *Id.*; see also *Nash v. Auburn Univ.*, 812 F.2d 655, 665 (11th Cir. 1987) (holding that a student disciplinary hearing is not required to follow the formal rules of evidence); *Henson v. Honor Comm. of Univ. of Va.*, 719 F.2d 69, 73 (4th Cir. 1983) (holding the same).

104. *Goss v. Lopez*, 419 U.S. 565, 581 (1975).

105. *Nash*, 812 F.2d at 663.

right to transcript, and an appellate procedure have not been constitutional essentials, but where institutions have voluntarily provided them, courts have often cited them as enhancers of the hearing's fairness."<sup>106</sup> While accused students have a right to consult legal counsel,<sup>107</sup> there is no right to active participation by attorneys.<sup>108</sup> In short, due process requires "only that [students] be afforded a meaningful hearing,"<sup>109</sup> and that the decision be supported by substantial evidence.<sup>110</sup> As long as a public university meets the constitutional standards, it need not follow its own internal procedures and rules in order to satisfy its constitutional obligations.<sup>111</sup>

By itself, this judicial deference to the academy in the area of due process raises significant constitutional concerns, but the Obama Administration exacerbated those concerns.<sup>112</sup> In its efforts to enforce Title

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106. 2 WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* § 9.4.2.2 (4th ed. 2006).

107. *Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993) (noting that "at most the student has a right to get the advice of a lawyer"); *Gorman v. Univ. of R.I.*, 837 F.2d 7, 16 (1st Cir. 1988) (noting that a student is not forbidden from obtaining legal counsel before or after the disciplinary hearing); *see also* *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 464 (S.D.N.Y. 2015) (reaffirming *Osteen*, 13 F.3d 221); *Haley v. Va. Commonwealth Univ.*, 948 F. Supp. 573, 582 (E.D. Va. 1996) (noting that procedures that afforded the student the opportunity to consult with an attorney outside of the disciplinary hearings were adequate).

108. *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 636 (6th Cir. 2005) ("Ordinarily, colleges and universities need not allow active representation by legal counsel or some other sort of campus advocate."); *see also Osteen*, 13 F.3d at 225 (noting that during a disciplinary hearing, "the lawyer need not be allowed to participate in the proceeding in the usual way of trial counsel, as by examining and cross-examining witnesses and addressing the tribunal"); *Henson v. Honor Comm. of Univ. of Va.*, 719 F.2d 69, 74 (4th Cir. 1983) (holding that a student received due process, even though a practicing attorney did not conduct his defense, because two student-lawyers consulted extensively with the student's attorney throughout the proceedings).

109. *Tigrett v. Rector & Visitors of the Univ. of Va.*, 290 F.3d 620, 630 (4th Cir. 2002).

110. *Nash*, 812 F.2d at 667-68.

111. *Riccio v. County of Fairfax*, 907 F.2d 1459, 1469 (4th Cir. 1990) (noting that violations of federal due process are to be measured by federal standards, not by a state's standard); *Bills v. Henderson*, 631 F.2d 1287, 1298 (6th Cir. 1980) ("[P]rocedural rules created by state administrative bodies cannot, of themselves, serve as a basis for a separate protected liberty interest."); *Bates v. Sponberg*, 547 F.2d 325, 329-30 (6th Cir. 1976) ("It is not every disregard of its regulations by a public agency that gives rise to a cause of action for violation of constitutional rights. Rather, it is only when the agency's disregard of its rules results in a procedure which in itself impinges upon due process rights that a federal court should intervene in the decisional processes of state institutions."); *Winnick v. Manning*, 460 F.2d 545, 550 (2d Cir. 1972) (holding that a university's violation of its own procedures did not amount to a violation of federal due process).

112. *See* K.C. JOHNSON & STUART TAYLOR, JR., *THE CAMPUS RAPE FRENZY: THE ATTACK ON DUE PROCESS AT AMERICA'S UNIVERSITIES* 9-10 (2017).

IX,<sup>113</sup> the Obama Administration issued a “Dear Colleague Letter”<sup>114</sup> setting out its view of the obligations of institutions receiving federal financial assistance under Title IX and its implementing regulations. This Dear Colleague letter “explains that the requirements of Title IX pertaining to sexual harassment also cover sexual violence, and lays out the specific Title IX requirements applicable to sexual violence.”<sup>115</sup>

This Dear Colleague letter “was not adopted according to notice-and-comment rulemaking procedures; its extremely broad definition of ‘sexual harassment’ has no counterpart in federal civil rights case law; and the procedures prescribed for adjudication of sexual misconduct are heavily weighted in favor of finding guilt.”<sup>116</sup> Specifically, the Dear Colleague Letters (1) suggests institutions handle sexual assault cases with a single person serving as detective, prosecutor, judge, and jury;<sup>117</sup> (2) maintains hearings are unnecessary;<sup>118</sup> (3) “implies that the school should not start the proceedings with a presumption of innocence, or even a stance of neutrality . . . [but with an assumption] any complaint is valid and the accused is guilty as charged;<sup>119</sup> (4) forbids the consideration of the victim’s/survivor’s sexual history with anyone other than the accused student;<sup>120</sup> (5) discourages cross-examination;<sup>121</sup> (6) allows an appeal of not guilty verdicts;<sup>122</sup> and (7) mandates a preponderance of the evidence—rather than clear and convincing evidence or beyond a reasonable doubt—standard for determining guilt.<sup>123</sup> Although the Dear Colleague Letter has resulted in

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113. Any university that receives federal funds for any purpose is subject to Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2012), and its implementing regulations, 34 C.F.R. § 106 (2015), which prohibit discrimination on the basis of sex in educational programs or activities operated by recipients of federal financial assistance.

114. See U.S. Dep’t of Ed., Office for Civil Rights, Dear Colleague Letter: Sexual Violence (Apr. 4, 2011) [hereinafter Dear Colleague Letter], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

On April 24, 2014, additional guidance was issued by the OCR entitled “Questions and Answers on Title IX.” Letter from Catherine E. Lhamon, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence (Apr. 24, 2014) [hereinafter OCR Questions and Answers], <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

Proposed regulations pursuant to the Violence Against Women Act were issued June 20, 2014, and final regulations were issued on October 20, 2014. Violence Against Women Act, 34 C.F.R. § 668 (2014).

115. Dear Colleague Letter, *supra* note 114, at 1.

116. *Plummer v. Univ. of Houston*, 860 F.3d 767, 779–80 (5th Cir. 2017) (Jones, J., dissenting).

117. See Dear Colleague Letter, *supra* note 114.

118. OCR Questions and Answers, *supra* note 114 at 25. With all due respect to the OCR, the Constitution does not permit the “single investigator” model for public institutions.

119. DAVID E. BERNSTEIN, *LAWLESS: THE OBAMA ADMINISTRATION’S UNPRECEDENTED ASSAULT ON THE CONSTITUTION AND THE RULE OF LAW* 126 (2015).

120. OCR Questions and Answers, *supra* note 114 at 31.

121. *Id.* at 30–31.

122. See Dear Colleague Letter, *supra* note 114, at 12.

123. See Dear Colleague Letter, *supra* note 114, at 11.

an increased focus on the problems of sexual assault on campus,<sup>124</sup> these suggestions and mandates further undermine due process.<sup>125</sup>

## II. THE CONSEQUENCES OF THE JUDICIARY'S DEFERENCE TO HIGHER EDUCATION

### A. Racial Preferences Have Significant Cost, Frequently Do Not Benefit Disadvantaged Students, and Are Unnecessary to the Achievement of Racial Diversity

Although selective institutions generally view racial preferences as having few negative consequences, little social costs, an effective means of helping disadvantaged students, and necessary to achieving racial diversity, there are significant reasons to doubt these conclusions.

First, at best it is debatable whether the benefits of racial preferences outweigh the costs.<sup>126</sup> Derek Bok and William Bowen argued racial preferences have substantial benefits to universities and few downsides,<sup>127</sup> but Russell K. Neili presents a very different view.<sup>128</sup> Drawing upon substantial social science data, Neili shows: (1) deep resentment of preferences among Whites and Asians;<sup>129</sup> (2) lower academic performance among minorities who are admitted under racial preferences;<sup>130</sup> (3) little impact on future earnings of minorities who benefit from preferences;<sup>131</sup> (4) increased self-segregation by race on campuses;<sup>132</sup> (5) no real economic benefits to Whites and Asians that attend racially diverse institutions;<sup>133</sup> and (6) in the context of law schools, higher drop out and bar failure rates.<sup>134</sup>

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124. When these tragic events occur, the institution has a constitutional and legal obligation to support the victims/survivors. Reporting is going to be painful, but a university can make it as painless as possible. Specifically, a public school must make abundant resources available to the survivors—whether it is relocation of residence, schedule adjustments, medical assistance, or psychological counseling. Dear Colleague Letter, *supra* note 114 at 15–16. Of course, the institution must ensure the alleged perpetrator or the alleged perpetrator's friends and allies do not retaliate against the victim/survivor. *Id.* at 16.

125. BERNSTEIN, *supra* note 119, at 124.

126. *See* Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN), 134 S. Ct. 1623, 1638–39 (2014) (Roberts, C.J., concurring).

127. *See generally* DEREK BOK & WILLIAM BOWEN, *THE SHAPE OF THE RIVER* (1998).

128. RUSSELL K. NIELI, *WOUNDS THAT WILL NOT HEAL: AFFIRMATIVE ACTION AND OUR CONTINUING RACIAL DIVIDE* (2012).

129. *Id.* at 172–79.

130. *Id.* at 163–72.

131. *Id.* at 143–48.

132. *Id.* at 186–87.

133. *Id.* at 215–22.

134. *Id.* at 222–32.

Second, racial preferences in admissions do not necessarily help those who are disadvantaged in contemporary society.<sup>135</sup> “Race-based affirmative action buys some diversity for a relative few, but not serious inclusion,”<sup>136</sup> but race does not, by definition, capture those who suffer the structural disadvantages of segregated schools and neighborhoods.<sup>137</sup> Fifty years ago, “race and gender were appropriate markers for the type of exclusion practiced by most predominately white universities. Today, place is a more appropriate indicator of who gets excluded from consideration by admissions officers at selective institutions.”<sup>138</sup> If public institutions wish to “help those [minority children] actually disadvantaged by [de facto] segregation,”<sup>139</sup> their admissions committees must acknowledge “whites who do live in impoverished environs or attend high-poverty schools are no less deserving of special consideration—as is anyone who is actually disadvantaged by economic isolation.”<sup>140</sup> Applicants from “low-opportunity places that rise, despite the undertow, deserve special consideration from selective schools. . . . And it should not matter what color they are or what nation they come from.”<sup>141</sup>

Third, in many instances, racial preferences are unnecessary to the achievement of racial diversity.<sup>142</sup> After California banned racial preferences through a state constitutional amendment, the University of California had an increase in both the number of minority applicants and number of minorities actually attending.<sup>143</sup> In areas where many high schools are not racially integrated, simply admitting the top students from every high school

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135. See generally SHERYLL CASHIN, *PLACE NOT RACE: A NEW VISION OF OPPORTUNITY IN AMERICA* (2014). Cashin argues preferences should emphasize:

place, rather than race, as the focus of affirmative action for the pragmatic reason that it will foster more social cohesion and a better politics. . . . Those who suffer the deprivations of high-poverty neighborhoods and schools are deserving of special consideration. Those blessed to come of age in poverty-free havens are not.

*Id.* at xv.

136. *Id.* at xx.

137. *Id.* at xv.

138. *Id.* at xvi.

139. *Id.* at xv (emphasis omitted).

140. *Id.* at 79 (emphasis omitted).

141. *Id.* at 56.

142. As a matter of constitutional law, the judiciary must inquire “into whether a university could achieve sufficient diversity without using racial classifications.” *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013). Put another way, the university must prove there are “no workable race-neutral alternatives that would produce the educational benefits of diversity.” *Id.* If there is a workable race neutral alternative, “then the University may not consider race.” *Id.*

143. RICHARD SANDER & STUART TAYLOR, JR., *MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT’S INTENDED TO HELP, AND WHY UNIVERSITIES WON’T ADMIT IT* 132-33 (2012).

can yield a significant amount of minority representation.<sup>144</sup> If racial minorities are a disproportionate share of the poor,<sup>145</sup> then a socio-economic preference has the potential to increase minority representation.<sup>146</sup> A similar logic applies to first generation students—applicants who will be the first in their families to attend college. Universities also could explore other creative race-neutral measures—such as quotas by region of the State—that might lead to increased minority representation. Each of these measures could promote or insure racial diversity without utilizing racial preferences.

## **B. Forcing Religious Groups to Include Non-Believers Undermines Confident Pluralism**

On many public university campuses, the aspirations of social justice progressives conflict with the fundamental principles of classical liberalism.<sup>147</sup> Wishing to satisfy the often vocal social justice progressives, university officials ignore or diminish the principles of classical liberalism.<sup>148</sup> Such an approach is constitutionally problematic and, ultimately, leads to totalitarianism.<sup>149</sup> The better approach is John Inazu’s call for a Confident Pluralism<sup>150</sup> that “conduces to civil peace and advances democratic consensus-building.”<sup>151</sup>

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144. *Fisher*, 133 S. Ct. at 2416.

145. Matthew Gaetner & Melissa Hart, *Considering Class: College Access and Diversity* 10 (U of Colorado Law Legal Studies Research Paper No. 12-18, 2013), <https://ssrn.com/abstract=2137126>.

146. Indeed, high achieving low-income students of all races are unlikely to apply to selective institutions. See Caroline M. Hoxby & Christopher Avery, *The Missing One-Offs: The Hidden Supply of High Achieving Low-Income Students*, BROOKINGS PAPERS ON ECON. ACTIVITY 1 (Spring 2013).

147. Although some may view this as a conflict between left and right, such a characterization is inaccurate. There are many Democrats or political liberals who embrace the ideals of free speech, religious freedom, equal protection, and due process. Conversely, there are some Republicans or political conservatives who reject those values and seek to silence those who disagree.

148. See GREG LUKIANOFF, *UNLEARNING LIBERTY: CAMPUS CENSORSHIP AND THE END OF AMERICAN DEBATE* (2012); KIRSTEN POWERS, *THE SILENCING: HOW THE LEFT IS KILLING FREE SPEECH* (2015). For a review of both works, see William E. Thro, *Betraying Freedom: A Review of Lukianoff’s Unlearning Liberty and Powers’ The Silencing*, 42 J. COL. & U. L. 523 (2016).

149. John D. Inazu, *Law, Religion, and the Purpose of the University*, WASH. U. L. REV. (Washington University in St. Louis Legal Studies Research Paper No. 17-02-07, forthcoming 2017), <https://ssrn.com/abstract=2921506>.

150. See JOHN D. INAZU, *A CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE* (2016).

151. *Christian Legal Soc. v. Martinez*, 561 U.S. 661, 734 (2010) (Alito, J., joined by Roberts, C.J., Scalia, & Thomas, JJ., dissenting) (quoting Brief for Gays & Lesbians for Individual Liberty as Amicus Curiae Supporting Petitioner at 35, *Christian Legal Soc’y v. Martinez*, 561 U.S. 661 (2010) (No. 08-1371)).

Expanding upon the ideas of other scholars,<sup>152</sup> Inazu describes a “Confident Pluralism” as “rooted in the conviction that protecting the integrity of one’s own beliefs and normative commitments does not depend on coercively silencing opposing views.”<sup>153</sup> Emphasizing both an inherent distrust of state power and a “commitment to letting differences coexist, unless and until persuasion eliminates those differences,”<sup>154</sup> Inazu “seeks to maximize the spaces where dialogue and persuasion can coexist alongside deep and intractable differences about beliefs, commitments, and ways of life” and to “resist coercive efforts aimed at getting people to ‘fall in line’ with the majority.”<sup>155</sup> His vision requires individuals to embrace tolerance,<sup>156</sup> humility,<sup>157</sup> and patience,<sup>158</sup> but his paradigm also requires the government to respect associational freedom,<sup>159</sup> ensure meaningful access to public forums,<sup>160</sup> and provide funding to support pluralism.<sup>161</sup>

Although Americans disagree about “the purpose of our country, the nature of the common good, and the meaning of human flourishing,”<sup>162</sup> we agree on the necessity of “limiting state power, of encouraging persuasion over coercion, and of supporting a robust civil society.”<sup>163</sup> This “modest unity” underlying Confident Pluralism includes both a premise of inclusion and a premise of dissent.<sup>164</sup> The Inclusion Premise “aims for basic membership in the political community to those within our boundaries.”<sup>165</sup>

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152. In the law review article that formed the foundation for his later book, Inazu explains:

The underpinnings of a confident pluralism are also advanced by a number of prominent scholars. Kenneth Karst insists that “[o]ne of the points of any freedom of association must be to let people make their own definitions of community.” William Eskridge reaches a similar conclusion: “The state must allow individual nomic communities to flourish or wither as they may, and the state cannot as a normal matter become the means for the triumph of one community over all others.” And David Richards reflects, “The best of American constitutional law rests. . . . on the role it accords resisting voice, and the worst on the repression of such voice.”

John D. Inazu, *A Confident Pluralism*, 88 S. CAL. L. REV. 587, 590-91 (2015) (footnotes omitted).

153. *Id.* at 592.

154. *Id.*

155. *Id.*

156. *Id.* at 597-98.

157. *Id.* at 599.

158. *Id.*

159. *Id.* at 604-06.

160. *Id.* at 606-08.

161. *Id.* at 608-12.

162. JOHN D. INAZU, *A CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE* 15 (2016).

163. *Id.*

164. *Id.*

165. *Id.* at 26.

The Dissent Premise recognizes individuals “must be able to reject the norms established by the broader political community with our own lives and voluntary groups.”<sup>166</sup> In order to recognize both inclusion and dissent, Inazu calls on the broader political community to respect associational freedom,<sup>167</sup> ensure meaningful access to public forums,<sup>168</sup> and provide funding to support pluralism.<sup>169</sup> Although our current constitutional framework requires a large degree of associational freedom, access to public forums, and public funding, Inazu argues that current doctrine “falls short and is headed in the wrong direction.”<sup>170</sup> His vision of Confident Pluralism requires the courts to “redefine and reimagine” doctrine concerning voluntary groups, expression in public places, and public funding of private expression.<sup>171</sup>

Allowing student religious groups to determine their own membership is essential to Confident Pluralism.<sup>172</sup> If the public institution wishes to promote understanding and dynamic discussion, a policy of forced inclusion “could be completely counterproductive, indeed nonsensical—*e.g.* forcing a Jewish club to allow Muslim or Christian Officers.”<sup>173</sup> Additionally, as Robert George observed, “the right to religious freedom by its very nature includes the right to leave a religious community whose convictions one no longer shares and the right to join a different community of faith, if that is where one’s conscience leads.”<sup>174</sup> Forcing a religious organization to accept those who disagree with its core tenets is to begin the process of changing the nature of organization.<sup>175</sup> If a Catholic organization is forced to accept Protestants, then the organization will be less Catholic and, in time, may not be Catholic at all. As Inazu explains, “[o]ne reason that associational freedom is the fundamental building block of a confident pluralism is that it shields groups and spaces from the reaches of state power. Without this initial sorting . . . the aspirations of a confident pluralism become functionally unworkable.”<sup>176</sup> Put another way, Confident Pluralism requires us to recognize that People of Faith should be able to study the Bible, Torah, Koran, or sacred text without including secularists who reject any notion of the divine.

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166. *Id.* at 30.

167. Inazu, *A Confident Pluralism* (Article), *supra* note 152, at 604-06.

168. *Id.* at 606-08.

169. *Id.* at 608-12.

170. INAZU, *CONFIDENT PLURALISM* (Book), *supra* note 162, at 125.

171. *Id.* at 126.

172. Inazu, *Confident Pluralism* (Article), *supra* note 152, at 612-13.

173. Brief for Am. Ctr. for Law & Justice, et al. as Amicus Curiae Supporting Petitioners at 9, *Agency for Int’l Dev. v. All. for Open Soc’y*, 133 S. Ct. 2321 (2013) (No. 12-10); *see also* Brief for Beckett Fund for Religious Liberty and Christian Legal Soc’y, et al. as Amicus Curiae Supporting Respondents at 10-11, *Agency for Int’l Dev. v. All. for Open Soc’y*, 133 S. Ct. 2321 (2013) (No. 12-10).

174. Robert P. George, *What is Religious Freedom?*, PUB. DISCOURSE, (July 24, 2013), <http://www.thepublicdiscourse.com/2013/07/10622>.

175. *See* *Cal. Democratic Party v. Jones*, 530 U.S. 567, 577-78 (2000).

176. Inazu, *Confident Pluralism* (Article), *supra* note 152, at 604.

### C. Diminished Due Process Protections Do Not Benefit the Sexual Assault Victim-Survivors

Responding to the 2011 Dear Colleague Letter, public institutions have created parallel criminal justice systems to deal with sexual assaults.<sup>177</sup> Like other student disciplinary proceedings involving life-altering consequences, these proceedings frequently have diminished due process protections.<sup>178</sup> Indeed, a campus sexual assault hearing often resembles the Star Chamber of sixteenth and seventeenth century England.<sup>179</sup> Thus, the possibility of erroneous outcomes—a false conviction—increases. Yet, this increased possibility of error has no corresponding benefit. “The notion that a school must diminish due process rights to better serve the ‘victim’ only creates more victims.”<sup>180</sup>

Public institutions frequently have ignored their obligations to support the victim-survivors.<sup>181</sup> Following the decline of the *in loco parentis* doctrine, universities have tolerated a student-life culture that emphasizes heavy drinking and casual sex.<sup>182</sup> Such an environment does not prevent sexual assault and, indeed, indirectly encourages it.<sup>183</sup> When students have come forward with allegations of sexual assault, campus officials often failed to: (1) provide adequate psychological counseling; (2) grant accommodations, such as changes in class schedule or housing; or (3) prevent retaliation by the alleged perpetrator’s supporters.<sup>184</sup> If a victim/survivor wished to pursue justice against an alleged attacker, the university often simply referred them to the criminal justice system, where police and

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177. See *Doe v. Univ. of Ky.*, 860 F.3d 365, 370-71 (6th Cir. 2017) (holding that Title IX sexual assault proceedings are quasi-criminal in nature and, thus, *Younger* Abstention should apply).

178. JOHNSON & TAYLOR, *supra* note 112, at 9-10, 85-116.

179. See G.J. MEYER, *THE TUDORS: THE COMPLETE STORY OF ENGLAND’S MOST NOTORIOUS DYNASTY* 343-45 (2010).

180. DeVos, *supra* note 92.

181. See Janet Napolitano, “*Only Yes Means Yes*”: *An Essay on University Policies Regarding Sexual Violence and Sexual Assault*, 33 YALE L. & POL’Y REV. 387, 387 (2014) (stating that increased awareness of sexual assault on campuses highlights the need for public institutions to significantly improve their procedures for responding to this problem); Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 214-17 (2011) (reviewing instances in which schools have failed to appropriately respond to allegations of sexual assault).

182. See Oren R. Griffin, *A View of Campus Safety Law in Higher Education and the Merits of Enterprise Risk Management*, 61 WAYNE L. REV. 379, 383 (2016) (noting how students are generally treated as adult consumers and are “free to engage in various activities at their own discretion”).

183. CHRISTOPHER P. KREBS ET AL., *THE CAMPUS SEXUAL ASSAULT (CSA) STUDY 2-5-2-8* (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> (noting that substance abuse and prior consensual sexual activity are major risk factors for sexual assault).

184. See Cantalupo, *supra* note 181, at 214-16 (describing instances in which university officials failed to provide appropriate support, protection, or accommodations for sexual assault victims, or failed to act at all).

prosecutors would not pursue ambiguous cases.<sup>185</sup> If the school initiated student disciplinary proceedings, it was often a horrific experience for the victim/survivor.<sup>186</sup> Sadly, at some institutions, the alleged perpetrator's status as an athlete or the child of a wealthy donor apparently influenced the decision to pursue discipline or the sanction involved.<sup>187</sup>

When a student makes an allegation of sexual assault, a public institution has a constitutional, legal, and moral obligation to support the victim-survivor.<sup>188</sup> Reporting is going to be painful, but a university can make it as painless as possible. Specifically, a public school must make abundant resources available to the survivors—whether it is relocation of residence, schedule adjustments, medical assistance, or psychological counseling.<sup>189</sup> Of course, the institution must ensure the alleged perpetrator or the alleged perpetrator's friends and allies do not retaliate against the victim/survivor.<sup>190</sup>

The institution has these obligations regardless of any uncertainties or ambiguities about the case. A student who sincerely believes she was sexually assaulted is going to manifest the trauma of a rape victim-survivor even though the alleged perpetrator may claim innocence or the evidence is at best inconclusive. The student must receive counseling and accommodation regardless of whether the institution successfully pursues disciplinary action.

These obligations are in addition to—not in place of—the obligations to the individual accused of the sexual assault. Fulfilling the institutional obligations to the victim/survivor will not harm the accused. Diminishing the due process protections for the accused will not help the victim-survivor.

### III. THE POSSIBILITY OF ENDING JUDICIAL DEFERENCE TO HIGHER EDUCATION

If academic administrators are no more angelic than other constitutional actors are, then their actions should receive doubt, not deference. Ending the deference to higher education and, thus, restoring the constitutional symmetry is possible. Such an effort must focus on state law,

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185. See Nancy Chi Cantalupo, "Decriminalizing" Campus Institutional Responses to Peer Sexual Violence, 38 J.C. & U.L. 481, 489–90 n.28 (2012) (noting that many institutions' sexual assault reporting guidelines emphasize contacting police).

186. Cantalupo, *Burying Our Heads*, *supra* note 181, at 214–16.

187. BERNSTEIN, *supra* note 119, at 123.

188. As part of its constitutional obligations under the Equal Protection Clause, a public institution should encourage victims/survivors to report the acts against them to the police and should support the student after the report. However, the OCR guidance takes a different view. *Id.* at 124–25.

189. Dear Colleague Letter, *supra* note 114, at 15–16.

190. *Id.* at 16.

federal statutory or regulatory changes, and, ultimately, overruling or limiting Supreme Court precedents.

**A. Treat Racial Preferences in Higher Education in the Same Manner as Racial Preferences in Other Contexts**

In the context of racial preferences, higher education officials have two advantages over other constitutional actors. First, university officials have the option of using the educational benefits of a diverse student body as a compelling governmental interest.<sup>191</sup> Second, when they choose to pursue this interest, public university administrators receive far greater deference on both the need to pursue the objective and the means of achieving that objective.<sup>192</sup> Although there are serious doubts that racial preferences actually increase minority enrollments at selective private institutions or at flagship state universities, both racial diversity and the use of racial preferences to achieve diversity are sacrosanct in higher education.<sup>193</sup> If either advantage were eliminated, university leaders would become apoplectic. Yet, there are reasons to believe that such a paradigm will be legal, if not constitutional, reality.

First, the People of individual states may well adopt state constitutional provisions mandating an end to racial preferences.<sup>194</sup> In *Schutte v. Coalition to Defend Affirmative Action, Integration, & Immigrant Rights & Fight for Equality by Any Means Necessary*,<sup>195</sup> the Court rejected a federal constitutional challenge to such measures.<sup>196</sup> As the public continues to doubt both the wisdom of university officials and the efficacy of racial preferences, other states may see similar measures.

Second, the Supreme Court may well reverse itself on the issue of whether obtaining educational benefits of diversity is a compelling governmental interest. Three current Justices—Chief Justice Roberts, Justice Thomas, and Justice Alito—have expressed, at least implicitly, their disapproval of diversity as a compelling governmental interest.<sup>197</sup> Although

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191. See *supra* note 60 and accompanying text.

192. See *infra* Part I(A).

193. See Jeremy Ashkenas, Haeyoun Park, & Amam Pearce, *Even With Affirmative Action, Blacks and Hispanics Are More Underrepresented at Top Colleges Than 35 Years Ago*, N.Y. TIMES (Aug. 24, 2017), <https://nyti.ms/2w0BE08>.

194. The People of Arizona, California, Florida, Michigan, Nebraska, New Hampshire, Oklahoma, and Washington have amended their State Constitutions to ban racial preferences in university admissions. See Ariz. Const. art. 1, § 36; Cal. Const. art. 1, § 31; Fla. Const. art. 1, § 2; Mich. Const. art. 1, § 26; Neb. Const. art. 1, § 30; N.H. Const. part 1, art. 2.; Okla. Const. art. 2, § 36A; and Wash. Const. art. 9, § 1.

195. 134 S. Ct. 1623 (2014).

196. *Id.* at 1636-37.

197. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 725-33, (2007) (Roberts, C.J., joined by Scalia, Thomas, & Alito, JJ., announcing the judgment of the Court); *Grutter v. Bollinger*, 539 U.S. 306, 346-48 (2003) (Scalia, J., dissenting); *Id.* at 352-54 (Thomas, J., joined by Scalia, J., dissenting).

Justice Gorsuch has not addressed the issue as either a Justice or a Tenth Circuit judge, the similarities between his judicial philosophy and Justice Scalia's judicial philosophy suggest he may reject diversity as a compelling governmental interest.<sup>198</sup> If the three Justices opposed to diversity remain consistent, if Justice Gorsuch is opposed to diversity as a compelling interest, and if one of the four pro-diversity Justices retires and is replaced by a Justice opposed to diversity, then the diversity rationale is doomed. Given three pro-diversity Justices are over seventy-nine and given all three embrace diversity as a compelling governmental interest, it seems quite likely that a pro-diversity justice will leave the Court before the 2020 election.

Third, even if the Court preserves diversity as a compelling governmental interest, the Court may well apply less deference to higher education officials' efforts to achieve diversity. In other words, the narrow tailoring inquiry may actually have teeth. Although Justice Kennedy has accepted diversity as compelling governmental interest, he generally was skeptical of the means to achieve the end.<sup>199</sup> Indeed, in *Fisher I*, Justice Kennedy—writing for the Court—deferred to university judgment as to whether to pursue diversity,<sup>200</sup> but refused to find that university officials were entitled to no deference as to the means of achieving that end.<sup>201</sup> Although Justice Kennedy—again writing for the Court—was far more deferential to the administrators in *Fisher II*,<sup>202</sup> he emphasized the “University’s program is *sui generis*.”<sup>203</sup> In a future case involving a university program that is not inherently unique, Justice Kennedy—and the four Justices opposed to diversity—may well return to the non-deferential approach of *Fisher I*.

## **B. Student Religious Organizations May Define Their Own Membership**

In the context of student religious groups, university administrators are allowed to do something that no other constitutional actor can do—force a religious organization to admit persons who reject fundamental tenets of the faith. Yet, there are several reasons to think public university administrators may face new limitations.

First, in some states, state law may protect the rights of student religious groups. Because state constitutions often are more protective of

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198. See Eric Citron, *Potential Nominee Profile: Neil Gorsuch*, SCOTUSBLOG (Jan. 13, 2017, 12:53 PM), <http://www.scotusblog.com/2017/01/potential-nominee-profile-neil-gorsuch/>.

199. See *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting).

200. *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2419 (2013).

201. *Id.* at 2420.

202. See Peter N. Kirasnow, *Race Discrimination Rationalized Again*, 2015-16 CATO SUP. CT. REV. 59, 63-85 (2016).

203. *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198, 2208 (2016).

individual liberty,<sup>204</sup> a student group may have a state constitutional right to exclude those who disagree with the group's views.<sup>205</sup> Indeed, since the Burger Court's decisions prompted a revival of state constitutional law in the early 1970's,<sup>206</sup> "it would be most unwise these days not also to raise the state constitutional questions."<sup>207</sup> Although the issue apparently is one of national first impression, it would not be surprising if a state court determined that its state constitution prohibited the government from indirectly forcing an organization to admit members who disagreed with the organization's objectives.<sup>208</sup> Moreover, state Religious Freedom Restoration Acts<sup>209</sup> prohibit government from imposing a substantial burden on the free exercise of religion unless there is a compelling governmental interest pursued through the least restrictive means.<sup>210</sup> To the extent that a student group's position is the result of religious belief, these state laws seem to prohibit government from indirectly forcing the inclusion of dissenters. Furthermore, in two some states, there are specific state statutes guaranteeing the right of religious groups to exclude those who do not embrace the faith.<sup>211</sup>

Second, the Court may well overrule *Christian Legal Society*. Two subsequent Supreme Court decisions, *Hosanna-Tabor* and *Alliance for Open*

204. A.E. Dick Howard, *The Renaissance of State Constitutional Law*, 1 EMERGING ISSUES IN ST. CONST. L. 1, 14 (1988).

205. State constitutions are fundamentally different from the National Constitution—the National Constitution is a grant of power and the state constitutions are limitations on power. See *Hornbeck v. Somerset Cty. Bd. of Educ.*, 458 A.2d 758, 785 (Md. 1983); *Bd. of Educ. v. Nyquist*, 439 N.E.2d 359, 366 n. 5 (N.Y. 1982). Thus, the presumptions concerning legislative authority are reversed. Congress may not act unless it can identify a specific enumerated power. See *U.S. v. Morrison*, 529 U.S. 598, 607 (2000). But, the state legislature may act unless there is an explicit restriction. See *Almond v. R.I. Lottery Comm'n*, 756 A.2d 186, 196 (R.I. 2000).

206. See generally A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976).

207. William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977).

208. Indeed, after the U.S. Supreme Court diminished religious freedom in *Smith*, several state courts held that the State Constitutions provided greater protection for religious freedom. See Douglas Laycock, *Theology Scholarships, The Pledge Of Allegiance, And Religious Liberty: Avoiding The Extremes*, 118 HARV. L. REV. 155, 211-12 (2004) (discussing cases).

209. See ARIZ. REV. STAT. ANN. §§41-14933–1493.02 (2009); CONN. GEN. STAT. ANN. §52-571b (West 2009); FLA. STAT. ANN. §§761.01-.05 (West 2016); IDAHO CODE §§73-401–404 (2017); 775 ILL. COMP. STAT. ANN. 35/1-99 (LexisNexis 2010); KY. REV. STAT. ANN. § 446.350 (West 2017); MO. STAT. §§1.302-.307 (2010); N.M. STAT. ANN. §§28-22-1 to 28-22-5 (West 2011); OKLA. STAT. ANN. Tit. 51, §§251-258 (West 2017); 71 PA. STAT. AND CONS. STAT. ANN. §§2401-2407 (West 2012); R.I. GEN. LAWS §§42-80.1-1–4 (2006); S.C. CODE §§1-32-10–60 (2005); TENN. CODE ANN. § 4-1-407 (2009); TEX. CIV. PRAC. & REM. CODE ANN. §§110.001-.012 (West 2009); UTAH CODE ANN. §§ 631-5-101–403 (LexisNexis 2016); VA. CODE ANN. §§ 57-1–2.02 (2009).

210. See Christopher C. Lund, *Religious Liberty after Gonzales: A Look at State RFRA's*, 55 S.D. L. REV. 466, 497 (2010); James W. Wright, Jr., *Making State Religious Freedom Restoration Amendments Effective*, 61 ALA. L. REV. 425, 426 (2010).

211. See KY. REV. STAT. § 164.348(4); VA. CODE ANN. § 23.1-400.

*Society* collectively undermine the result in *Christian Legal Society*.<sup>212</sup> The first, *Hosanna-Tabor*, establishes that religious groups have a right of religious autonomy—absolute discretion to determine whom its leaders will be.<sup>213</sup> Logically, if an organization can restrict its leadership to those who adhere to the faith, then the organization ought to be able to impose a similar requirement on membership. That is the opposite result of *Christian Legal Society*. The second, *Agency for International Development v. Alliance for Open Society International, Inc.*,<sup>214</sup> represents a revival and redefinition of the unconstitutional conditions doctrine—government may impose conditions that define the program, but may not impose conditions that reach outside the program. As a result, government cannot force a religious group to surrender its religious autonomy rights as a condition of receiving some government subsidy or benefit—such as university recognition or access to student activity funds.<sup>215</sup> That outcome also is the direct opposite of *Christian Legal Society*. In sum, *Hosanna-Tabor* and *Alliance for Open Society* collectively contradict the result in *Christian Legal Society*.<sup>216</sup>

Third, even if the Court does not overrule *Christian Legal Society*, it may limit the holding to circumstances where *all* student groups must admit *all* students. Some Universities allow political groups to exclude those who disagree with the groups' objectives, but force religious groups to admit everyone.<sup>217</sup> Such a policy requires religious groups to be treated differently than secular organizations. In *Trinity Lutheran Church v. Comer*, the Court held that government could not treat religious organizations differently from secular organizations.<sup>218</sup> That holding requires universities to treat student religious organizations in the same manner as student secular organizations.<sup>219</sup>

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212. See William E. Thro, *The Limits of Christian Legal Society*, 2014 CARDOZO L. REV. DE NOVO 124 (2014); William E. Thro, *Undermining Christian Legal Society v. Martinez*, 295 ED. L. REP. 867 (2013).

213. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012).

214. 570 U.S. 205 (2013).

215. See OFFICE OF THE ATTORNEY GENERAL: FEDERAL LAW PROTECTIONS FOR RELIGIOUS LIBERTY at 3 (Oct. 6, 2017) (discussing interaction between *Alliance for Open Society* and *Hosanna-Tabor*).

216. To be sure, *Christian Legal Society* remains the controlling constitutional rule until explicitly overruled. *Agostini v. Felton*, 521 U.S. 203, 237-38 (1997). “At most, *Hosanna-Tabor* and *Alliance for Open Society* cast serious doubt on the reasoning of *Christian Legal Society* and provide the basis for asking the Court to overrule *Christian Legal Society*.”

217. See *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790 (9th Cir. 2011) (upholding such a policy).

218. 137 S. Ct. 2012, 2021-22 (2017).

219. This analysis is limited to discrimination based upon belief and does not apply to discrimination based on race or sex. If a public institution required all student organizations to refrain from race or sex discrimination, then, under the reasoning of *Christian Legal Society*, the institution would not violate the federal constitution.

### C. Enhanced Due Process Protections for Life-Altering Disciplinary Proceedings

Given the potentially life-altering consequences of a Title IX sexual assault proceeding, there is a need for enhanced due process protections. These enhanced protections involve three critical elements: (1) strict separation of roles; (2) a hearing focused on a search for the truth; and (3) a standard of proof that is high enough to prevent wrongful convictions. Each of these is detailed below.

First, the institutions must strictly separate the investigative, prosecutorial, adjudicative, and appellate functions. America's criminal justice system acknowledges the possibility that individuals may abuse their power; it disperses authority among multiple individuals and contains structural safeguards to prevent abuse of power.<sup>220</sup> A prosecutor must obtain a grand jury indictment or preliminary hearing finding of probable cause.<sup>221</sup> A single juror can prevent a finding of guilt.<sup>222</sup> A guilty verdict, but not an acquittal, is subject to appellate review.<sup>223</sup> The authority to imprison an individual is never concentrated in an individual.<sup>224</sup> While neither our constitutional system nor our criminal justice system operates perfectly, avoiding concentrations of power and authority makes it more likely that society, rather than a faction,<sup>225</sup> will prevail and only the guilty will go to jail.

The same principles must apply when a public university confronts an allegation that could result in expulsion. The individuals who investigate the allegation must not be involved in the decision to prosecute, the determination of guilt, or the appellate review. The individuals who determine whether to initiate disciplinary proceedings or whether to negotiate some sort of "plea bargain" must not be involved in the investigation or the adjudication of guilt.<sup>226</sup> The individuals who determine whether the student is, in fact, guilty must not be involved with the investigative phase, the decision to charge, or the appellate review. The

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220. See, e.g., Bertrall L. Ross II, *Reconciling the Booker Conflict: A Substantive Sixth Amendment in a Real Offense Sentencing System*, 4 CARDOZO PUB. L., POL'Y & ETHICS J. 725, 758 (2006) (describing the separate roles given to the judge and the jury); James Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 DUKE L.J. 651, 656 (1976) (discussing different procedural safeguards in our criminal justice system).

221. *Thirty-Ninth Annual Review of Criminal Procedure: 2010*, 39 GEO. L.J. ANN. REV. CRIM. PROC. 223, 239, 247 (2010).

222. *Burch v. Louisiana*, 441 U.S. 130, 134 (1979) (holding that there is a constitutional right to a unanimous jury if the jury only has six members).

223. U.S. CONST. amend. V, § 1.

224. See Ross, *supra* note 220, at 758–59 (noting that the judge and jury have different functions so that one entity does not have all the power).

225. THE FEDERALIST NO. 10 (James Madison).

226. Moreover, the accused individual should have the right to offer a rebuttal to the investigative report. See ABA CRIMINAL JUSTICE SECTION TASK FORCE ON COLLEGE DUE PROCESS RIGHTS AND VICTIM PROTECTIONS: RECOMMENDATIONS FOR COLLEGES AND UNIVERSITIES IN RESOLVING ALLEGATIONS OF CAMPUS SEXUAL MISCONDUCT (2017).

appellate panel must have not be involved in the investigation, prosecution, or hearing and, more importantly, should have the right to reverse on any legal or factual ground.<sup>227</sup>

Second, the hearing must be a search for the truth of guilt or innocence. The accused individual must have access to an attorney and the attorney must be able to actively participate.<sup>228</sup> Additionally, in order to ensure the correct result, the accused student must have access to all inculpatory and exculpatory evidence.<sup>229</sup> There should be no surprises at the hearing.<sup>230</sup> Because the student is presumed innocent, the institution has the burden of proving guilt.<sup>231</sup> Since “[c]ross-examination is the principal means

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227. Many institutions limit appeals to specific grounds, such as the discovery of new information. See Elizabeth Bartholet, Nancy Gertner, Janet Halley & Jeannie Suk Gersen, *Fairness For All Students Under Title IX*, DIGITAL ACCESS FOR STUDENTS AT HARVARD (Aug. 21, 2017), <https://dash.harvard.edu/bitstream/handle/1/33789434/Fairness%20for%20All%20Students.pdf>.

228. While a public university is not required to provide an attorney for a student accused of sexual assault, *Lassiter v. Dep’t of Soc. Servs. of Durham Cty.*, 452 U.S. 18, 25 (1981), the institution cannot prohibit the student from seeking legal counsel. *Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993) (noting that “at most the student has a right to get the advice of a lawyer”); *Gorman v. Univ. of R.I.*, 837 F.2d 7, 16 (1st Cir. 1988) (noting that a student is not forbidden from obtaining legal counsel before or after the disciplinary hearing); see *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 464 (S.D.N.Y. 2015) (reaffirming *Osteen*); *Haley v. Va. Commonwealth Univ.*, 948 F. Supp. 573, 582 (E.D. Va. 1996) (noting that procedures that afforded the student the opportunity to consult with an attorney outside of the disciplinary hearings were adequate). Nor can the university prohibit an attorney from being present at the hearing and offering advice as a *passive* participant. Cf. *Osteen*, 13 F.3d at 225 (holding that when the student may also face criminal charges, “it is at least arguable that the due process clause entitles him to consult a lawyer, who might for example advise him to plead the Fifth Amendment”); *Gabrilowitz v. Newman*, 582 F.2d 100, 107 (1st Cir. 1978) (holding that when criminal charges are also pending, a student must be allowed to have an attorney present during the disciplinary hearings to provide advice, but the attorney does not have to actively participate in the student’s defense).

229. See Lisa M. Kurcias, *Prosecutor’s Duty to Disclose Exculpatory Evidence*, 69 *FORDHAM L. REV.* 1205, 1210–11 (2000) (stating that criminal procedural rules require the government to produce all material and exculpatory evidence upon request). Schools should apply the same rules to disciplinary proceedings.

230. While this proposition may seem obvious, it presents special problems in the context of the victim’s previous sexual history. “Over the last few decades, almost all American courts have limited the extent to which accused rapists can bring in the sexual past of an alleged victim. This ensures that rape trials are not in effect also putting the victim on trial.” BERNSTEIN, *supra* note 119, at 125 (stating that public universities must follow the same approach as the federal rules of evidence FED. R. EVID. 412 or applicable state law.). See also Pamela J. Fisher, *State v. Alvey: Iowa’s Victimization of Defendants Through the Overextension of Iowa’s Rape Shield Law*, 76 *IOWA L. REV.* 835, 835 (collecting rape shield laws from most states).

231. See Barton L. Ingraham, *The Right to Silence, the Presumption of Innocence, the Burden of Proof, and a Modest Proposal: A Reply to O’Reilly*, 86 *J. CRIM. L. & CRIMINOLOGY* 559, 562–63 (1996) (noting that although the prosecution in a criminal case has the burden to prove all the elements of the crime charged, the defendant in a criminal case has no burden of proof).

Although some insist victims/survivors have “procedural equality,” Nancy Chi Cantalupo, *Address: The Civil Rights Approach to Campus Sexual Violence*, 28 *REGENT U.*

by which the believability of a witness and the truth of his testimony are tested,<sup>232</sup> there must be some form of cross-examination.<sup>233</sup> As a further safeguard against wrongful convictions, any finding of guilt should be unanimous.<sup>234</sup> Finally, there should be no appellate review of a “not guilty” verdict.<sup>235</sup>

Third, the standard of proof must be high enough to avoid wrongful convictions. In the criminal justice system, a conviction for sexual assault requires the prosecution to prove every element of the offense beyond a reasonable doubt (99% certainty).<sup>236</sup> However, if a student disciplinary system uses a lesser standard, such as clear and convincing evidence (75%), or, as the OCR guidance mandates, a mere preponderance of the evidence (50.01%),<sup>237</sup> then the likelihood that an innocent person will be found guilty increases dramatically.<sup>238</sup> In order to minimize the possibility of false convictions, institutions should be required to utilize a clear and convincing evidence standard or a beyond a reasonable doubt standard.<sup>239</sup>

This vision of enhanced due process is an aspiration, but there are reasons to believe it may soon be a reality.

First, the Trump Administration has rescinded the Obama Administration’s Dear Colleague Letter<sup>240</sup> and announced its intention to promulgate regulations promulgated through “a transparent notice and

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L. REV. 185, 193 (2016), the governmental actor cannot transfer its responsibilities to a private individual. The matter is not *Victim/Survivor v. Alleged Perpetrator*; the matter is *Public University v. Alleged Perpetrator*. It is the public university that has the constitutional and legal obligation to remedy known incidents of sex discrimination, including sexual assault. It is the alleged perpetrator who violated the university’s rules.

232. *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

233. Although trial attorneys strive to perfect the technique of leading questions, the veracity and accuracy of a witness’s testimony can be questioned and refuted without leading questions. Instead, cross-examination can take place through the hearing officer or by requiring advocates to ask more open-ended questions.

234. *Cf. Burch v. Louisiana*, 441 U.S. 130, 134 (1979) (holding that there is a constitutional right to a unanimous jury if the jury only has six members).

235. The Dear Colleague Letter required that victim/survivors be able to appeal a not guilty verdict. *See* Dear Colleague Letter, *supra* note 114 at 11.

236. *Jackson v. Virginia*, 443 U.S. 307, 309 (1979) (stating that the Constitution requires application of the reasonable doubt standard for all criminal convictions).

237. Dear Colleague Letter, *supra* note 114, at 11.

238. *See* John Villasenor, *Probabilistic Framework for Modeling False Title IX “Convictions” Under the Preponderance of the Evidence Standard*, 15 L., PROBABILITY, & RISK 223 (2016).

239. To be sure, as I explained elsewhere, under current due process jurisprudence, it is possible to provide due process while utilizing the preponderance of the evidence standard. *See* William E. Thro, *No Clash of Constitutional Values: Respecting Freedom & Equality in Public University Sexual Assault Cases*, 28 REGENT UNIV. L. REV. 197, 209 (2016). My point is that the existing due process jurisprudence should change for proceedings with potentially life altering consequences.

240. *See* U.S. Dep’t of Ed., Office for Civil Rights, Dear Colleague Letter (Sept. 22, 2017), <https://content.govdelivery.com/accounts/USED/bulletins/1b8ba66> (announcing the withdrawal of the 2011 Dear Colleague Letter).

comment process to incorporate the insights of all parties in developing a better way.”<sup>241</sup> Declaring “the era of ‘rule by letter’ is over,”<sup>242</sup> the Secretary of Education called for a new paradigm where “[e]very survivor of sexual assault must be taken seriously. Every student accused of sexual misconduct must know that guilt is not predetermined.”<sup>243</sup> In the interim, the Department of Education issued a new question and answer guidance, which provides far greater flexibility than the Obama Administration’s Dear Colleague Letter.<sup>244</sup> While any new regulations implementing Title IX will be limited to the context of Title IX sexual assault proceedings, the enhanced due process measures in one context likely will lead to similar measures in other contexts involving life altering events.

Second, when confronted with due process claims in the Title IX Sexual Assault context, the courts are showing less deference to university officials.<sup>245</sup> In a case involving *Younger* abstention,<sup>246</sup> the Sixth Circuit has found Title IX sexual assault proceedings to be “akin to criminal prosecution.”<sup>247</sup> In cases where the credibility of the Complaining Witness is at issue, the Sixth Circuit held that the Complaining Witness must be visible and audible to the fact finder and must be subjected to some form of cross-examination.<sup>248</sup> Taken together, the two Sixth Circuit decisions suggest a far less deferential attitude toward university administrators and university procedures.

## CONCLUSION

Public university administrators are not angels; they are human beings. Like all human beings, they “have sinned and fall short of the glory of God.”<sup>249</sup> Like all human beings, have they unconscious biases that color their attitudes and reactions to others.<sup>250</sup> University officials have laudable

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241. DeVos, *supra* note 92.

242. *Id.* at 3.

243. *Id.* at 4.

244. See U.S. DEP’T OF EDUC., OFF. FOR C.R., Q & A ON SEXUAL MISCONDUCT (Sept. 2017).

245. K.C. Johnson has identified sixty-seven cases where the courts have denied a university’s motion to dismiss. See *Complaints and Lawsuits*, SAVE (Sept. 20, 2017) <http://www.saveservices.org/sexual-assault/complaints-and-lawsuits/>.

246. See *Younger v. Harris*, 401 U.S. 37, 44 (1971) (“This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of ‘comity,’ that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.”).

247. *Doe v. Univ. of Ky.*, 860 F.3d 365, 370 (6th Cir. 2017).

248. See *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 402-04 (6th Cir. 2017).

249. *Romans* 3:23 (English Standard Version).

250. HOWARD J. ROSS, EVERYDAY BIAS: IDENTIFYING AND NAVIGATING UNCONSCIOUS JUDGMENTS IN OUR DAILY LIVES 3–4 (2014) (arguing that all humans are fraught with bias).

ends—achieving racial diversity, making the LGBTQ community feel welcome and included, and supporting the victim-survivors of sexual assault. In their pursuit of these ends, they use constitutionally dubious means. They engage in the “sordid business” of racial sorting,<sup>251</sup> deny the Constitution’s “special solicitude” toward religion,<sup>252</sup> and employ “shameful” procedures “wholly un-American and . . . anathema to the system of governance to which our Founders pledged their lives over two hundred years ago.”<sup>253</sup>

Although the judiciary vigorously enforces constitutional limitations in non-higher education contexts, when confronted with claims from academe, the judiciary abdicates and defers. The courts never tolerate racial classifications except when university administrators pursue them. Religious organizations enjoy absolute autonomy except when their members are students.<sup>254</sup> Civil and criminal courts respect due process, but campus disciplinary proceedings—which have life changing consequences—disregard the principles of Magna Carta.<sup>255</sup>

This judicial deference must end. A Republic “conceived in liberty” and “dedicated to the proposition that all . . . are created equal”<sup>256</sup> cannot tolerate higher education administrators betraying these principles. Fortunately, the Constitution’s Calvinist features allow for correction. Because the Constitution divides sovereignty between the States and the National Government, the State can impose limitations where the federal judiciary does not.<sup>257</sup> Exercising its enumerated powers in the space between what the Constitution prohibits and what the Constitution requires, the National Government—through statutes or regulations—may limit the discretion of higher education. Where previous decisions depart from the original public meaning or a construction consistent with original public meaning, the Supreme Court can—and should—overrule its previous interpretation.<sup>258</sup>

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251. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., joined by Alito, J., concurring in part and dissenting in part).

252. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 189 (2012).

253. DeVos, *supra* note 92.

254. *Compare Hosanna Tabor*, 565 U.S. at 189 with *Christian Legal Soc. v. Martinez*, 561 U.S. 661, 687-98 (2010).

255. CLAIRE BREAY, *MAGNA CARTA: MANUSCRIPTS & MYTHS* 28-29 (2010).

256. Abraham Lincoln, *GETTYSBURG ADDRESS* (Nov. 19, 1863).

257. *See generally* EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS* (2013).

258. *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 85 (1938) (Black, J., dissenting) (“A constitutional interpretation that is wrong should not stand.”).

